No. 15-

IN THE

Supreme Court of the United States

DEBRA JONES AND ARDEN C. POST, INDIVIDUALLY AND AS THE NATURAL PARENTS OF TODD R. MURRAY; DEBRA JONES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TODD R. MURRAY, FOR AND ON BEHALF OF THE HEIRS OF TODD R. MURRAY,

Petitioners,

v.

VANCE NORTON, VERNAL CITY POLICE OFFICER IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; VERNAL CITY, A MUNICIPALITY IN UTAH; DAVE SWENSON, IN HIS INDIVIDUAL CAPACITY; CRAIG YOUNG, IN HIS INDIVIDUAL CAPACITY; REX OLSEN, IN HIS INDIVIDUAL CAPACITY; JEFF CHUGG, IN HIS INDIVIDUAL CAPACITY; ANTHONEY BYRON, IN HIS INDIVIDUAL CAPACITY; BEVAN WATKINS, IN HIS INDIVIDUAL CAPACITY; TROY SLAUGH, IN HIS INDIVIDUAL CAPACITY; SEAN DAVIS, IN HIS INDIVIDUAL CAPACITY; UINTAH COUNTY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED:

1. Where it is undisputed that Plaintiffs/Petitioners Debra Jones and Arden Jones, and their deceased son Todd R. Murray, all had individual rights under the 1868 Ute Tribe treaty with the United States, and where, under the procedural posture of this case, it is undisputed that Plaintiffs' and their Decedent son's individual rights under the Treaty were violated, did Plaintiffs state a claim for relief under 42 U.S.C. § 1983 based on the violation of their treaty rights?

2. Where State police officers have pursued an Indian within Indian country without either probable cause or jurisdictional authority can they be relieved of the common law duty to preserve evidence simply because the officers' tortious conduct giving rise to the claims against them arose within Indian country?

3. Where there are disputed material facts, can a district court grant summary judgment based upon the court's opinion that a reasonable jury would decide the case in favor of the summary judgment movant? [1]

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1. Because of the Tenth Circuit's disposition, the Court did not address the Plaintiffs/Petitioners' argument that the Utah Governmental Immunity Act ("UGIA"), Utah Code Ann. 63G-7-101, *et seq.*, does not immunize state actors for tortious acts committed inside the Tribe's reservation. *See* Pet. App. 173a – 176a. If this Court grants certiorari and reverses summary judgment, the Court should remand with instructions to the Tenth Circuit to address whether the UGIA applies.

RULE 29.6 DISCLOSURE STATEMENT

No corporate entity is a petitioner.

LIST OF PARTIES IN THE TENTH CIRCUIT

The Plaintiffs/Appellants in the Tenth Circuit were Debra Jones and Arden C. Post, individually and as the natural parents of Todd R. Murray; Debra Jones, as Personal Representative of the Estate of Todd R. Murray, for and on behalf of the heirs of Todd R. Murray.

The Defendants/Appellees in the Tenth Circuit were Vance Norton, Vernal City Police Officer in his official and individual capacity; Dave Swenson, in his in individual capacity; Craig Young, in his individual capacity; Rex Olsen, in his individual capacity; Jeff Chugg, in his individual capacity; Anthoney Byron, in his individual capacity; Bevan Watkins, in his individual capacity; Troy Slaugh, in his individual capacity; Sean Davis, in his individual capacity; Vernal City, Utah, a municipality in Utah; Uintah County, a political subdivision of the State of Utah; and Blackburn Company, d/b/a Thomas-Blackburn Vernal Mortuary.

The Plaintiffs/Petitioners seek certiorari review from the decision of the Tenth Circuit related to all of the Defendants with the exception of Blackburn Company, d/b/a Thomas-Blackburn Vernal Mortuary.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States court of appeals for the Tenth Circuit in this case.

CITATION OF DECISION

Jones v. Norton, 3 F. Supp. 1170 (D. Utah Mar. 7, 2014), *aff'd* 809 F.3d 564 (10th Cir. Dec. 29, 2015).

STATEMENT OF JURISDICTION

The court of appeals issued its decision on December 29, 2015. Pet. App. 1a. Petitioners timely requested reconsideration, which was denied on February 24, 2016. Pet. App. 177a. Justice Sotomayor granted a timely application to extend the time to file this petition to July 13, 2016. App. No. 15A1123. This Court has jurisdiction under 28 U.S.C. § 1254(1).

TREATIES AND STATUTES

Article 6 of the Treaty with the Utes, 1868, states in full:

If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the tribes herein named solemnly agree that they will, on proof made to their agent and notice to him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws, and in case they wilfully refuse so to do, the person injured shall be re-imbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States.

42 U.S.C. § 1983 states in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

STATEMENT OF THE CASE

This lawsuit stems from the shooting death of 21-year-old Todd R. Murray, a member of the Ute Indian Tribe of the Uintah and Ouray Indian Reservation, a federally recognized Indian tribe. Murray, a passenger in a vehicle pursued by police for speeding, died of a gunshot wound to his head as he was being pursued on foot and ordered to the ground at gunpoint by off-duty Vernal City, Utah police detective Vance Norton. The shooting occurred on

Indian trust lands more than 25 miles inside the northern boundary of the Tribe's Uncompahgre Reservation, a reservation that had been in continuous existence for 125 years at the time of Murray's shooting death.[1] The shooting occurred more than 35 miles southwest of Vernal City, Utah, where Detective Norton was employed.

Murray's parents, Debra Jones and Arden Post, and Murray's estate (the "Murray family") brought a 13-count complaint against nine individual Utah state, county and municipal law enforcement officers (collectively, "the State officers"), their government employers, and a private mortuary, alleging constitutional violations under 42 U.S.C. § 1983, conspiracy to violate civil rights under 42 U.S.C. § 1985, and common law tort claims for wrongful death, assault and battery, and emotional distress.

The district court denied the Plaintiffs' motion for spoliation sanctions and granted summary judgment in favor of the State officers and their employers on the federal claims. The district court also granted summary judgment to the mortuary on Plaintiffs' claims for emotional distress. The district court, however, declined to exercise supplement jurisdiction over the remaining common law torts for assault and battery and wrongful death, and dismissed those claims. The summary

1. The Uintah and Ouray Indian Reservation is comprised of two separate, adjoining reservations, the Uintah Valley Indian Reservation, established by Executive Order of October 3, 1861, Exec. Order No. 38-1, *reprinted in* 1 Charles Kappler, *Indian Affairs: Laws and Treaties* 900 (1904), and the Uncompahgre Indian Reservation, established by Executive Order dated January 5, 1882, *reprinted in Executive Orders Relating to Indian Reserves* 109 (GPO 1902).

judgment was affirmed by the Court of Appeals for the Tenth Circuit. Pet. App. 1a.

I. Factual and Procedural History

A. The Historical, Legal, and Jurisdictional Context

The State of Utah "forever" disclaimed all right and title to "all lands … owned or held by any Indian or Indian tribes" under both the Utah Enabling Act of 1894, 28 Stats. 107, and the Utah Constitution, art. III, §2. The State's disclaimer effectively disclaims both proprietary and governmental authority. *Seneca-Cayuga Tribe of Oklahoma v. Oklahoma*, 874 F.2d 709, 710, 716 (10th Cir. 1989) (considering the disclaimer in the Oklahoma Enabling Act which is identical in language to the Utah Enabling Act). Consequently, the State of Utah and its counties and municipalities have no criminal jurisdiction over Indians inside the boundaries of Indian reservations in Utah. *See United States v. Felter*, 752 F.2d 1505, 1508 n.7 (10th Cir. 1985).

Yet, notwithstanding this legal framework, there have been recurring boundary disputes and flash points between the Ute Tribe and the State of Utah, and there have been what the Tribe considers to be frequent unwarranted and illegal state incursions inside its reservation boundaries. Most recently, last year the Tenth Circuit reversed a Utah district court's refusal to enjoin the State of Utah's prosecution of Ute Indians for alleged on-reservation offenses. *Ute Indian Tribe v. Utah*, 790 F.3d 1000, 1012 (10th Cir. 2015), *cert. denied*, __U.S. __, 136 S. Ct. 1451, 194 L. Ed. 2d 575 (2016). Speaking for

the court, Judge Gorsuch wrote that the State's unlawful criminal prosecution of tribal members was nothing more than another naked effort by "intransigent litigants" to "undo the tribal boundaries" that were long ago settled by the Tenth Circuit and left undisturbed by this Court. *Id.* at 1005, 1012.

It is against this contentious historical and legal backdrop that the shooting death of Todd Murray occurred.

B. The Police Pursuit and Murray's Fatal Shooting

There are only a half dozen material facts that are undisputed in regard to the State officers' pursuit of Todd Murray and Murray's shooting: first, Murray was a Ute Indian; second, Murray was fatally shot more than twenty five miles inside the boundary of the Uncompahgre Reservation, a reservation that had been in existence for more than 125 years at the time of the shooting; third, the Utah state officers who pursued Murray at gunpoint had neither reasonable suspicion nor probable cause to believe Murray had committed an off-reservation offense;[2] fourth, none of the State officers who pursued Murray were cross-deputized to exercise criminal jurisdiction over Indians inside the reservation;[3] fifth, Murray was a

2. The district court found that the State officers pursuing Murray "had no probable cause to believe that Mr. Murray had violated the law because Mr. Murray was not the driver of the speeding car." Pet. App. 171a; *see also* Pet. App. 168a.

3. The district court also found that "Mr. Murray's offense, if he committed one, did not begin in the pursuing officers' jurisdiction,

right-handed individual who died of a gunshot wound to the back of his head, above and behind his left ear; and finally, in the thirty minute interval between Murray's shooting and the arrival of an ambulance, none of the State officers rendered medical aid to Murray.[4]

Other than these half dozen undisputed facts, all of the remaining facts material to the police pursuit of Murray and Murray's shooting are either (*i*) the subject of the State officers' conflicting testimony, conflicting statements in official incident reports, and conflicting inferences from the evidence; alternatively, (*ii*) as discussed *infra*, they are facts, presumably material, that were irrevocably lost due to the spoliation of critical evidence that occurred in this case, including the State officers' failure to collect and preserve evidence, and the State officers' admitted tampering with Murray's body and Murray's bodily fluids before Murray's body was delivered to the Office of the Utah Medical Examiner for a scheduled autopsy that, ultimately, was never performed.

Todd Murray, a 21 year-old Ute Indian, was the passenger in a car driven by another tribal male, 17 year-old Uriah Kurip, on a Sunday morning, April 1, 2007. Pet. App. 4a. Utah State Trooper Dave Swenson testified that he began pursuing the Kurip vehicle after he clocked the vehicle traveling 74 miles/hour in a 65 mile/hour traffic zone just outside the reservation boundary. Pet. App. 39a. Trooper Swenson continued the pursuit for more than

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but rather when he fled the officers pursuing him on foot on the Uintah-Ouray Reservation." *Id.*

4. Ex. 29 to Plaintiffs' Opposition to Summary Judgment, *Jones v. Norton*, No. 2:09-cv-730 (D. Utah Ap. 8, 2013), Dkt. 328-29.

twenty-five miles inside the Uncompahgre Reservation before Kurip lost control of the vehicle on a dirt road in a remote area of the reservation. Pet. App. 42a. Both Kurip and Murray exited the vehicle, apparently unharmed, and ran in opposite directions. *Id.* Officer Swenson ran after and quickly apprehended the driver. *Id.*

At this time, other State officers began to arrive. Pet. App. 43a. And it is at this juncture—upon the arrival of other State officers—that major discrepancies appear in the State officers' testimony and official incident reports. At the same time, however, the evidence also makes clear that there was a window of time—lasting perhaps for several minutes—when Detective Norton and Todd Murray were alone together, on the western side of a hill, and out of the other State officers' field of vision. *Id.* It is during this window of time that Plaintiffs believe Norton shot Murray, execution style, in the back of his head.

1. The Hill and Escarpment Terrain Where Murray Was Shot

The "Book Cliffs" escarpment and hill terrain[5] where Detective Norton pursued Murray is steep in places, rocky and uneven, and none of the state or federal law enforcement officers measured the distances, or differences in elevation, where key events in the pursuit and shooting occurred.[6] All of the officers relied on

5. The Book Cliffs are a series of desert mountains and cliffs in western Colorado and eastern Utah.

6. *E.g.,* Ashdown Depo., Ex. M, Plaintiffs' Mtn. for Spoliation Sanctions, *Jones v. Norton*, No. 2:09-cv-730 (D. Utah Feb. 22, 2013), Dkt. 258-14, p. 111:2-5.

their memory and estimation of distances in both their written reports and their deposition testimony.[7] All of the officers first arrived on the scene at the intersection of Seep Ridge and Turkey Track Roads, where the Kurip vehicle had skidded off the road.[8] Between the two roads and the location where Murray was shot, there is a hill that ascends to the west and then drops off sharply on the western side down to a rock ledge where Murray was shot.[9] It is impossible to see the rock ledge where Murray was shot from the intersection of Seep Ridge and Turkey Track Roads.

2. Detective Norton's Disappearance Over the Hill

Trooper Swenson testified that Detective Norton was the first officer to arrive on the scene after Kurip's apprehension, and Swenson says he directed Norton to begin looking for Murray while he remained with Kurip at the intersection.[10] Sheriff's Deputy Anthoney Byron and State Trooper Craig Young arrived next, and at this point, major discrepancies appear in the deposition testimony and official incident reports of the three officers, Norton, Bryon, and Young.

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7. *E.g.,* Norton Depo., Ex. A, Plaintiffs' Mtn. for Spoliation Sanctions, *Jones v. Norton*, No. 2:09-cv-730 (D. Utah Feb. 22, 2013), Dkt. 258-1.

8. Attach. Dkt. 264-8, p.15.

9. Ex. X, Plaintiffs' Mtn. for Spoliation Sanctions, *Jones v. Norton*, No. 2:09-cv-730 (D. Utah Feb. 22, 2013), Dkt. 258-25.

10. Swenson Depo, Ex. 13, Plaintiffs' Opposition to Summary Judgment, *Jones v. Norton*, No. 2:09-cv-730 (D. Utah Ap. 8, 2013), Dkt. 328-13; *compare* Pet. App. 43a.

Detective Norton testified that he spoke with Trooper Young and discussed with him that Young would proceed south on Turkey Track Road while Norton headed west.[11] However, Byron and Craig testified in turn that Norton had already "disappeared," or was disappearing when they arrived on scene.[12] Byron also testified that he and Young never spoke to Norton until after the shooting. Byron and Young both testified that they drove south on Turkey Track Road in their separate patrol cruisers, but from that point on, Byron's and Young's separate accounts diverge sharply in relation to what the two officers together saw and did.

3. Conflicting Evidence on Whether Any Officer Other Than Norton Witnessed Murray's Shooting

According to the State officers' official incident reports, Detective Norton was the only eyewitness to Murray's shooting. Deputy Byron, however, claimed for the first time in his deposition that he saw Murray fall to the ground, although Byron could not say whether Murray had fallen because he was shot.[13] Byron also could not explain why information this important had been omitted from his

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11. Norton Depo, Ex. 9 to Plaintiffs' Opp. to Summary Judgment, *Jones v. Norton*, No. 2:09-cv-730 (D. Utah Ap. 8, 2013), Dkt. 328-9.

12. Young Depo., Ex. 15 to Plaintiffs' Opp. to Summary Judgment, *Jones v. Norton*, No. 2:09-cv-730 (D. Utah Ap. 8, 2013), Dkt. 328-15; Byron Depo., Ex. 3 to Plaintiffs' Opp., Dkt. 323-3.

13. Byron Depo., Ex. 3 to Plaintiffs' Opp., Dkt. 323-3, pp. 94-112.

official incident report.[14] The Tenth Circuit nonetheless credited Byron's testimony and further concluded that Byron's testimony corroborated Norton's account that "no other person, including Detective Norton, was within 100 yards of Murray when he was shot." Pet. App. 17a. The problem with the Tenth Circuit's conclusion is that Byron's testimony was completely contradicted by the testimony of Trooper Craig Young, the fellow officer whom Deputy Byron says he was walking with, together, "through a gully," when he saw Murray fall. App. 6a. Officer Young testified in his deposition that after he and Byron left Trooper Swenson, Young and Byron drove their patrol cruisers about a quarter mile south of the intersection of Seep Ridge and Turkey Track roads. Young says he and Byron were only at that location "briefly … [a]nywhere from 30 seconds to a minute," during which time they never had visual contact with either Murray or Detective Norton.[15] Officer Young also testified that reports of shots being fired may have come across police radios while he and Byron were in their patrol cruisers driving south, away from the shooting scene.[16] Finally, Trooper Young testified that after he and Deputy Byron returned north to the location of Murray's shooting, Young spoke with Detective Norton about the shooting, and Young testified that Norton never told him that Murray had shot himself:

> Q. So Officer Norton never told you that the suspect shot himself, did he?

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14. *Id.* at pp. 99:21-101:24; 104:9-15 – 105; 106:23.

15. Young Depo., Ex. 15 to Plaintiffs' Opp. to Summary Judgment, *Jones v. Norton*, No. 2:09-cv-730 (D. Utah Ap. 8, 2013), Dkt. 328-15, pp. 35, 86:9-21.

16. *Id.*, Dkt. 328-15 at p. 80.

A. No.[17]

C. The Spoliation of Critical Evidence

Spoliation, or *destruction of evidence*, means "rendering discoverable matter permanently unavailable to the court and the opposing party."[18] Plaintiffs' motion for spoliation sanctions identified nearly two dozen separate pieces of critical evidence that were spoliated, including, *inter alia*, the two firearms allegedly used, and the clothing worn, by Murray and Detective Norton at the time of the shooting, as well as separate blood draws from Murray's body after the shooting.[19] Plaintiffs argued that the "coffers of evidence" had been systematically stripped of any evidence that might have allowed Plaintiffs to refute the State officers' account of what happened.[20] Plaintiffs described the spoliation as "so extensive it can only be characterized as brazen and flagrant."[21] In fact, the State officers' own retained expert acknowledged that the spoliation was "improper," "suspicious," and "in contravention to State law."[22] Plaintiffs emphasized that the extensive spoliation of critical evidence had deprived

17. *Id.* Dkt, 328-15, p. 97:19-21.

18. Jamie S. Gorelick, Stephen Marzen, Lawrence Solum, Destruction of Evidence 4 (1989).

19. *See* Plaintiffs' Motion for Spoliation Sanctions, *Jones v. Norton*, No. 2:09-cv-730 (D. Utah Feb. 22, 2013), Dkt. 258, pp. vii-xvi.

20. *Id.*, Dkt. 258, pp. vi, 12.

21. *Id.*, Dkt. 258, p. 12.

22. Reit Depo., Ex. C to Plaintiffs' Motion for Sanctions, Dkt. 258—3, pp. 48-52.

Plaintiffs of constitutional due process because the spoliation had "irreparably impaired" their ability "not only to prove the elements of their claims, but to refute the Defendants' asserted defenses."[23] The district court acknowledged that Plaintiffs had been prejudiced by the spoliation, the court remarking from the bench at a hearing on May 22, 2013:

> [T]he burden is, I believe, on the plaintiffs to show spoliation. They have made a showing, because perhaps the key issue in this case is, "Did Mr. Murray commit suicide or did he not?" The only evidence that we now have primarily is Officer Norton's statements. All of the physical evidence is not available. That certainly shows a prejudice to the plaintiffs. I know you say, defense, that that shows a prejudice to you, which I think this emphasizes, and if we had certain physical evidence, it could resolve this matter so it is definitely prejudicial.[24]

In the end, however, the district court denied Plaintiffs' motion for spoliation sanctions in its entirety,[25] and the Tenth Circuit affirmed.[26]

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23. *Id.*, Dkt. 258.

24. Transcript of 5/22/2013 hearing, p. 5-5:15.

25. Pet. App. 121a – 147a.

26. Pet. App. 29a – 33a.

D. The Basis for Federal Jurisdiction

The Murray family initially brought their claims in Utah state court. The State of Utah, who no longer is a party, removed the case to federal court on the grounds that Plaintiffs' claims under 42 U.S.C. §§ 1983 and 1985 presented claims within federal question jurisdiction under 28 U.S.C. § 1331.[27]

REASONS FOR GRANTING THE PETITION

The Murray family requests that this Court grant a writ of certiorari to review three aspects of the court of appeals' decision that are in conflict with the decision of other circuits and/or in conflict with this Court's decisions. First the court of appeals erred in holding that Plaintiffs may not vindicate federal rights under the Ute Treaties of 1863 and 1868 through 42 U.S.C. § 1983. Second, the court of appeals erred by creating an exception, contrary to existing precedent, that relieves the State officers of the common law duty imposed on all other potential civil litigants to prevent spoliation of evidence. Third, in deciding whether the State officers were entitled to summary judgment, the court of appeals erroneously predicted what it believed a "reasonable jury" would do if that reasonable jury were presented with the evidence in this case. In making its prediction, the Court improperly weighed the evidence and credited the movants' statements in affirming summary judgment.

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27. *See* State of Utah's Notice of Removal, *Jones v. Norton*, No. 2:09-cv-730 (D. Utah Aug. 20, 2009), Dkt. 1.

I. The court of appeals' decision that Individual Rights granted under the Ute Treaties of 1863 and 1868 Cannot Be Vindicated Under 42 U.S.C. § 1983 is contrary to the decisions of other circuits regarding individual treaty rights and is contrary to this Court's jurisprudence on the interpretation of treaty rights.

In Count 8 of their complaint, the Murray family pled a claim under 42 U.S.C. §1983 for violation of an individual right that the Ute Tribe secured on behalf of its members through a treaty with the United States. That treaty provision provides:

> If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

Ute Treaty of 1868 §6, 15 Stat. 619.

42 U.S.C. § 1983 provides that a person has a federal cause of action for violation of the constitution, laws, or treaties of the United States. Tribal treaties are, of course, federal law. U.S. Const. Art. VI, Cl. 2.

The district court dismissed Count 8 on the pleadings. Pet. App. 151a – 158a. Appellate review is de novo, based on the allegations in the Murray family's complaint.[28] *Soc. of Separationists v. Pleasant Grove City*, 416 F.3d 1239 (10th Cir. 2005). Under those allegations, the State officers undisputedly qualified as "bad men among the whites." The Murray family's complaint alleges that one or more of the State officers killed Mr. Murray without provocation and then the other officers conspired to cover up the killing.

All other circuits that have reached the issue have held that when, as here, an individual tribal member has an individual right guaranteed by federal treaty, the individual tribal member can enforce that right through an action under 42 U.S.C. § 1983. *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989); *Mille Lacs Band of Chippewa Indians v. Minnesota,* 853 F. Supp. 1118 (D. Minn. 1994), *aff'd,* 124 F.3d 904 (8th Cir. 1997), *aff'd,* 526 U.S. 172 (1999).[29] Federal district courts and state courts have reached the same result. *E.g.*, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin,* 663 F. Supp. 682 (W.D. Wis. 1987); *Alaska v. Native Village of Curyung*, 151 P.3d 388 (Alaska 2006) (holding that tribes may bring parens patriae suits under 42 U.S.C. § 1983). All of these holdings are consistent with the more

28. *See* Plaintiffs' Third Amended Complaint, *Jones v. Norton*, No. 2:09-cv-730 (D. Utah March 15, 2012), Dkt. 170.

29. Because Indian Reservations are concentrated in states in the Eighth, Ninth, and Tenth Circuits, most case law comes from those circuits; and for the current issue all three of these circuits have weighed in, with the Eighth and Ninth Circuits on one side, and the Tenth Circuit on the other.

general rule of law described by this Court in *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84 (2002) and *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987). As *Wright* holds, unless a defendant shows that "Congress specifically foreclosed a remedy under § 1983," an individual right provided for by the Constitution, treaty or federal law can be combined with 1983 to provide a remedy. *Id.* at 424 (citations omitted).

In *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*, 538 U.S. 701 (2003), this Court held that a tribe could not bring a 1983 claim for violation of a sovereign right, but this Court noted that its holding was limited to the Tribe, and the Court stated in dicta that an individual tribal member is a "person" under 1983 and, therefore, permitted to bring claims for violation of his or her individual rights under 1983. Similarly in *United States v. Dion*, 476 U.S. 734 (1986), this Court stated that tribal "treaty rights can be asserted by Dion as an individual member of the Tribe." *Dion,* 476 U.S. at 738 n. 4.

In every 1983 claim the plaintiff combines a substantive right created under federal law with the remedial provision of 1983 to state a cause of action. The Murray family did that here, and while the substantive right at issue (the right under a bad man clause of a tribal treaty) had never before been combined with 1983 to state a cause of action, the method of combining the right and the remedy was otherwise unremarkable.

The specific right at issue here is the right of individual tribal members to obtain compensation for harm caused by bad men. In treaties with 11 tribes or bands in 1867 and 1868, the United States included "Bad Men" clauses.

James D. Leach, *Bad Men Among the Whites Claims after Richard v. United States*, 43 New. Mex. L. Rev. 533, 533 n.5. Under these clauses, the United States guaranteed financial compensation to individual tribal members who were harmed by "bad men among the whites." The clauses were added to the treaties based upon multiple incidents before 1867, which showed that without a federal guarantee, tribes and their members would obtain compensation from or retaliation against the wrongdoer through other means, often applying the tribes' traditional standards; and that this too often led to a spiral of depredations and violence between Indians and non-Indians. *Id.* at 534-35.

These bad men clauses, including the bad men clause in the Ute Treaty of 1868, remain enforceable federal law. 15 Stat. 619; *Ute Indian Tribe v. United States*, 330 U.S. 169 (1947). That is undisputed in this case.

The State officers also conceded, and the courts below agreed with the Plaintiffs, on the more difficult of the two primary elements of their 1983 claims: that the Ute Tribe's 1868 treaty with the United States provides individual tribal members with a right to compensation for damages caused by "bad men." Pet. App. 22a-23a. But then the court of appeals, in a rudimentary and very poorly researched discussion, incorrectly rejected the Murray family's discussion that 1983 is broad enough to provide a remedy. The court reasoned that because the Murray family can sue the United States for reimbursement, the family cannot sue the "bad men" directly. Pet App. 23a. The only case that the court of appeals cited for its holding is *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), a case that is directly contrary to the court of appeals' decision

below. The court of appeals incorrectly stated that *Hoopa Valley* holds that there is "no §1983 remedy." Pet. App. 24a. *Hoopa Valley* is actually consistent with all the other circuits that have reached the issue and with the dicta from this Court: *Hoopa Valley* explicitly distinguished between claims by a tribe as a sovereign, which it held are not enforceable under 1983, and claims by individual Indians, which are enforceable under 1983.

While the court of appeals was correct that case law establishes that individual tribal members can sue the United States, neither logic nor case law supports the conclusion the Court drew from that correct premise, that the Murray family cannot, therefore, sue the bad men directly under 1983.

Under that case law, the hurdle for an individual tribal member plaintiff is whether the right asserted by the tribal member is an individual right. The vast majority of rights under Indian treaties run only to the Tribe itself, not to individual tribal members, but the right that the Murray family asserted here is a right that the United States and the Tribe agreed by treaty would be provided to individual members. Further, once a tribal member plaintiff establishes (as was conceded here) that he/she has an individual right under the treaty, then every case other than the Tenth Circuit's decision below holds that the tribal member can bring suit under 1983 for the violation of that individual treaty right.

In addition to creating a conflict between itself and other circuits regarding the use of 1983 to vindicate an individual right, the court of appeals sub silento refused to apply the well-established law that tribal treaty rights

must be interpreted as the tribe and their members understood the right. The federal court is to look "only to the substance of the right, without regard to technical rules, framed under a system of municipal jurisprudence formulating the rights and obligations of private persons." *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886). There are numerous cases from this Court reiterating this standard. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 206–08 (1978); *Choctaw Nation of Indians v. United States,* 318 U.S. 423 (1943); *Seufert Bros. Co. v. United States,* 249 U.S. 194, 198–99 (1919). The court of appeals did not analyze the treaty as it would be understood by Ute Indians in 1863 or 1868. The "bad men" were the ones committing the legal wrongs referenced in the treaties, and while the United States was ensuring compensation, it was not barring suits directly against the wrongdoers for compensation for the wrongs. Instead the court of appeals expressly relied upon "technical rules" from 21st century American jurisprudence to hold that tribal members cannot obtain compensation through a 1983 claims. In doing so it ignored the Murray family's discussion of the applicable rule of statutory interpretation and the court then violated the applicable rule.

This Court should grant certiorari in this matter and determine whether the Murray family plaintiffs can bring an action under 42 U.S.C. § 1983 to enforce the individual rights that were secured to them by treaty.

II. The court of appeals created an exception to a litigant's duty to avoid spoliation sanctions that is contrary to all other case law.

The court of appeals' decision creates a new, substantial, and dangerous, exception to potential litigants' duty not to spoliate evidence. It held that where there is a criminal investigation, the potential litigant has no duty to prevent spoliation. App. 31a-32a. That exception is contrary to the law in all other circuits and contrary to the central purpose of the duty to prevent spoliation.

The established rule is that every potential litigant has a duty not to spoliate evidence, and that the duty arises when the person or entity knows that litigation can reasonably be expected. "[T]he duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." *Silvestri v. Gen. Motors Corp.,* 271 F.3d 583, 591 (4th Cir. 2001) (citing *Kronisch v. United States,* 150 F.3d 112, 126 (2d Cir. 1998)).

In the present matter, the threshold for application of that duty was plainly met. The district court expressly stated that "in light of the seriousness of the incident and the involvement of [state] officers on the Reservation where they did not have jurisdiction, litigation could reasonably be expected." Pet. App. 138a. When, as here, litigation can reasonably be expected, a duty arises on litigants and potential future litigants to preserve relevant evidence within its control or ability to preserve. *Burris v. Gulf Underwriters Ins. Co.*, 787 F.3d 875, 880 (8th Cir. 2015); *Adkins v. Wolever*, 554 F.3d 650 (6th Cir. 2009); *In*

re Marc Rich & Co., A.G., 707 F.2d 663, 667 (2d Cir. 1983) ("The test for the production of documents is control, not location.").

The second inquiry, when spoliation has occurred, is whether the innocent party was prejudiced by it.[30] *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007). Contrary to the law in other circuits, which hold that ability to prevent spoliation is the relevant inquiry, the court of appeals in this matter held that the State officers in this case did not have a duty that all potential civil litigants have to prevent spoliation because the United States had the legal duty to investigate any criminal activity.

For example, as potential civil litigants, the State officers had a duty to prevent spoliation of the gun that the officers dubiously claimed was used to fire the fatal shot, and evidence on the gun. It is also true that as part of its duty to investigate Detective Norton's potential criminal activity, the United States should have had the gun tested for fingerprints (Norton's fingerprints on the gun would have shown that he was being untruthful); for ballistics (to determine if the gun had fired the fatal shot); and for blowback blood or human tissue (to determine if, as appears to be the case from the close-up, very clear photo of the gun, Vernal/Uintah App. Ct. Br. addendum 8 (App. Doc 10109367855 at p. 9) that there was no blood or tissue on the gun, which also would have shown Norton to be untruthful). The United States did not comply with

30. The district court likewise acknowledged that Plaintiffs suffered prejudice from the extensive spoliation. Tr. p. 1-22 (May 22, 2013).

its duty, but that is not the issue before the courts in this case. Instead the legal issue is whether the State officers complied with their distinct legal duty as potential civil litigants.

Similarly, the State officers had the ability to preserve Norton's gun, and clothing and to test them and Norton's hands and body for blood and tissue (if such blood or tissue were present, it would show Norton was lying); to prevent Norton from tampering with the crime scene, and to preserve the vials of blood that they took from the decedent.[31] They did none of these things which were within their control.

This legal issue is squarely presented by the facts of this case. The record plainly shows, and the court of appeals held, that the prerequisite in the case law that triggered the State officers' duty to prevent spoliation had been met, Pet. App. 138a; and the fact that the United States had jurisdiction to investigate whether a crime occurred did not affect or impede the State officers' separate and distinct responsibility to comply with their duty as civil litigants. In fact, as discussed below, the state and local law applicable to the State officers mandated

31. Defendants without any legitimate reason, removed multiple blood samples from Mr. Murray's body, but they did not have even one sample for which they had a chain of custody for testing; and most of which oddly simply went missing. Hearing Transcript, 61612013, pp. 3437, App. XVII, 5457-60. Even though they had no admissible blood samples, they made allegations that decedent had some drugs and alcohol in his system. Under the tried methods for admitting evidence at trial, their unprovable assertion would not have gotten before the jury, and it had no proper place before the lower courts.

that the State officers and their employers conduct a civil investigation into the officer-involved shooting;[32] however, the State officers choose to disregard that law.

Through former FBI Agent Ashdown, the United States stated that if the State officers had requested that the gun be preserved, it would have been; and if State officers had requested preservation of other evidence from the gun, that preservation would have occurred. Agent Ashdown testified that the FBI's criminal jurisdiction over Mr. Murray's shooting did not impede, impinge, or otherwise preclude the State, county and municipal defendants from taking steps to preserve critical evidence. Indeed, when the attorney for the Murray family examined Agent Ashdown and asked if the FBI would have performed ballistics testing on the .380 gun allegedly fired by Mr. Murray, Agent Ashdown replied, "If one of the involved departments had asked me to do that, it would have been done as a courtesy to them."[33] Agent Ashdown also readily acknowledged that federal and state law enforcement agencies frequently cooperate on an inter-agency basis for both on and off reservation crimes.[34] The State officers did not take the required steps to preserve the evidence, even though they at all times knew that litigation was likely and even after the Murray family provided them with express notice that the Murray

32. *See* Vernal City Police Manual, Ex. Z to Plaintiffs' Mtn. for Spoliation Sanctions, *Jones v. Norton*, No. 2:09-cv-730 (D. Utah Feb. 22, 2013), Dkt. 258-27.

33. Tr. p. 171, ln 7-9 (June 6, 2013). Presumably, the FBI would have been equally agreeable to luminol testing Detective Norton's clothing for trace blood spatter that could have been DNA tested.

34. *Id.*, p. 160, ln: 12-20.

family would be bringing civil claims against the State officers.[35] The State officers did not comply with their duty as civil litigants, and significant spoliation sanctions would have been appropriate had the court of appeals not created the newfound exception to the spoliation rule.

Under all other case law these two duties—the duty of a civil litigant and a criminal investigator—are separate. Yet here, with the court of appeals' blessing, defendants were relieved of their duty as litigants.

The court of appeals' acceptance of the State officers' unprecedented argument has serious and troubling ramifications: it suggests the judicial process can be deliberately thwarted in Indian country, that State officers can pursue Indians illegally within Indian country at gunpoint, spoliate critical evidence, and suffer no adverse consequences. Those ramifications should not be accepted lightly. In officer involved shootings, there almost always are two separate investigations undertaken, a criminal investigation into the shooting itself, and an administrative or "internal" investigation into the law enforcement officers' use of force. The Vernal City Police Department—Detective Norton's employer—had a mandatory procedure for handling officer-involved shootings on April 1, 2007, the date of Mr. Murray's shooting death.[36] That policy explicitly mandated that

35. *See* Murray family's Notice of Claim, Ex. Z to Plaintiffs' Mtn. for Spoliation Sanctions, *Jones v. Norton*, No. 2:09-cv-730 (D. Utah Feb. 22, 2013), Dkt. 258-12.

36. Dkt. 258, p. 24; Dkt. 258-27, p. 5. (Sections 3.10.032 and 3.10.033, stating, "The Vernal City Police Department is responsible for the criminal investigation of the suspect's actions, the civil

"[c]are should be taken to preserve the integrity of any physical evidence present on the officer, equipment or clothing (e.g. blood, fingerprints) until investigators or lab personnel can properly retrieve it."[37] That specific mandate was indisputably violated in this case, as both the district court and court of appeals' decisions make clear.[38] Yet an underlying current in both rulings is that the FBI's investigatory jurisdiction over Mr. Murray's shooting death negated the duty imposed by law on any litigant, or potential litigant, to preserve likely evidence. The propriety of the Tenth Circuit's exception is squarely presented by the facts of this case and the Murray family requests that this Court grant certiorari to review that exception.

III. The Court of Appeals Erred by affirming summary judgment based upon how it predicted a jury would have decided the case after being presented with conflicting evidence on material facts.

The final issue for which this Court should grant the writ of certiorari is a relatively narrow but very important divergence in the case law in the lower courts regarding weighing the evidence and assessing witness credibility in deciding summary judgment. The standard for summary

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investigation, and the administrative investigation" and "The Vernal City Police Department will conduct timely civil and/or administrative investigations").

37. Dkt. 258-27, p. 7.

38. Slip Op. at 32 ("It is arguable that [Detective] Norton had an independent duty to preserve any trace evidence on his own firearm because he, independent of the FBI investigation, could reasonably have anticipated litigation.").

judgment is, of course, one of the most important, most used, legal standards in federal courts, and it has been 30 years since this Court issued its last major decisions clarifying the summary judgment standard. Those decisions were in a trilogy of cases decided in 1986. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The standard is in need of fine tuning, to prevent the type of injustice that occurred to the Murray family below and to prevent the lower courts from resolving cases based upon what judges contend a "reasonable jury" should do when there is conflicting evidence on a material fact.

In this Court's decisions in 1986, it set out, and sought to then synthesize, two competing considerations. Far better than the Murray family can do, Justice Brennan, in his dissent in *Anderson*, described the competing considerations and his concerns, now partially come to fruition, regarding the difficulty the lower courts would have in synthesizing the competing considerations.

> The Court's opinion is replete with boilerplate language to the effect that trial courts are not to weigh evidence when deciding summary judgment motions:
>
> > "[I]t is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter...." *Ante,* at 2511.

> "Our holding ... does not denigrate the role of the jury.... Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Ante,* at 2513.

But the Court's opinion is also full of language which could surely be understood as an invitation—if not an instruction—to trial courts to assess and weigh evidence much as a juror would:

> "When determining if a genuine factual issue ... exists ..., a trial judge must *bear in mind the actual quantum and quantity* of proof necessary to support liability.... For example, *there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quality* to allow a rational finder of fact to find actual malice by clear and convincing evidence." *Ante,* at 2513 (emphasis added).

> "[T]he inquiry ... [is] whether the evidence presents a *sufficient*

> disagreement to require submission to a jury or whether *it is so one-sided* that one party must prevail as a matter of law." *Ante,* at 2512 (emphasis added).
>
> "[T]he judge must ask himself ... whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Ibid.*
>
> I simply cannot square the direction that the judge "is not himself to weigh the evidence" with the direction that the judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that "quantum." I would have thought that a determination of the "caliber and quantity," *i.e.,* the importance and value, of the evidence in light of the "quantum," *i.e.,* amount "required," could *only* be performed by weighing the evidence.

Anderson, 477 U.S. 242, 265-67.

It appears that both the dissent and the majority in *Anderson* understood that the two competing considerations are in fact two separate sequential steps in the legal analysis, and that a lower court cannot go on to

the second step unless it finds that the motion meets the requirement of the first step. The first step is to determine whether there are material facts in dispute. If there are, then the lower court is to use the time-tested method of resolving those disputed material facts—trial, cross examination, and resolution by a jury. The second step is to determine whether a reasonable jury could find for either side based upon the undisputed facts. *E.g.*, *Scott v. Harris*, 550 U.S. 372, 380-81 (2007) (holding that a video of the events provided undisputed facts which were then sufficient for the court to determine that a reasonable jury would reject plaintiff's claim).

In the present matter, the district court and court of appeals both skipped over the first step, and went straight to their predication about what a jury would do with the disputed evidence. Pet. App. 16a – 17a; 60a - 66a; 70a – 71a. That predictive approach is troubling at summary judgment, when the witnesses have not testified before a jury and have not been subjected to the benefits to the search for truth that cross-examination provides.[39] It is also particularly troubling in cases like the present—civil rights cases for damages against rogue cops, brought after the government has chosen not to prosecute. The only chance Mr. Murray's parents have to expose the truth behind their son's death is through a trial, which both the district court and the Tenth Circuit stripped from them based upon the courts' prediction of what a jury might do with the competing evidence.

39. Notably Federal Rule of Civil Procedure does not state that a district court should attempt to predict what a jury would do. Instead the rule states "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

The Murray family is not so naïve that they fail to understand that a jury of non-Indians may tend to believe police officers even with the multiple discrepancies and holes in the officers' disparate accounts. But the Murray family is also naïve enough to believe they have the right to present their son's death to a jury, to discuss with the jury the disputes regarding the material facts, and to seek a verdict based upon the evidence that comes in under the time-tested method of trial. The Murray family would relish the opportunity to have the State officers attempt to explain the contradictions between their version of facts and the physical evidence, and to have Defendants attempt to explain to a jury how their wholesale spoliation of evidence could be interpreted as anything other than guilty knowledge of what that evidence would have shown.

The present matter provides an ideal vehicle for this Court to clarify that the summary judgment inquiry is a two-step sequential process, where the lower courts cannot go on to predict what a reasonable jury would do if the material facts are in dispute. As described in detail in the statement of facts above, there was evidence supportive of each side's position on all of the significant issues in this case. The State officers' expert testified that the gun that fired the fatal shot would have been immediately covered with "blowback" tissue and blood. Dkt. 261-1 at 13. Detective Norton, the only living witness to Mr. Murray's death, claimed that Mr. Murray shot himself. Norton[40] or his colleagues then photographed that gun at the scene, but the officers' own photograph

40. Norton was permitted free reign at the crime scene, and he testified at deposition that he walked to his vehicle multiple times and through the crime scene "investigating." Norton Depo., 165, l.14-16; 174, l.8. He was also left in possession of his own handgun for over half an hour after he admittedly shot at Mr. Murray. Jensen Depo., 33 l.5-7; 61, l.9

chillingly shows no blowback on the gun that the officer falsely claims Murray used to shoot himself, and then the officers conspicuously chose not to have Norton's gun or clothing tested for blowback blood or tissue.[41]

Because Mr. Murray is right handed, but was shot on the left side of his head, the allegation of suicide "is viewed with a degree of suspicion" by investigators:

> Based on the fact that Todd Murray was reported to be right-handed, and the fatal injury was inflicted on the left side of the head, the examination of physical evidence is imperative to a conclusion of suicide as the manner of death. A gunshot wound to the left side of the head by a right-handed individual is viewed with a degree of suspicion, which must be satisfied through further investigation, including a forensic examination of trace evidence. In the instant case, there appears to have been no further investigation, no examination or analyses of trace evidence, and improper destruction of evidence which might have answered investigative questions.[42]

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41. In their brief to the Court of Appeals, the State officers asserted, based upon allegations outside the record in this case, that the gun Norton identified as the murder weapon belonged to the person who had been driving the car in which Mr. Murray was a passenger; and that this somehow bolstered Norton's claim. It does not, first, because police had already arrested the driver and had taken control of his vehicle, and secondly, because regardless of the origin of the gun, it was not the murder weapon, because it did not have blowback blood or tissue on it.

42. *See* Ex. I to Plaintiffs' Mtn. for Spoliation Sanctions, *Jones v. Norton*, No. 2:09-cv-730 (D. Utah Feb. 22, 2013), Dkt. 258-10, Report of William T. Gault.

Additionally, although Mr. Murray was shot on the back left side of his head, there was no blood, tissue or gunshot residue on Mr. Murray's left hand. In fact, Defendant Swenson stated in his deposition that he visually inspected Mr. Murray for a weapon after Mr. Murray had gotten out of Kurip's car and that he did not observe any weapon.[43] It goes without saying that if Swenson was correct that Mr. Murray did not even have a gun, then Mr. Murray did not shoot himself as Norton later claimed. The State officers can conjecture that maybe Swenson simply missed that Murray was armed, and can conjecture that perhaps it was possible that Mr. Murray could have somehow shot himself with his right hand on the left back side of his head, but it was unlikely and certainly not an issue that should have been taken from the jury based solely on Norton and Byron's self-serving testimony.

The district court and the court of appeals discounted the very strong evidence that the officer was misstating how Mr. Murray's death occurred. The district court did so by inverting this Court's summary judgment decisions, stating that, "[t]he Plaintiffs question Detective Norton's version of the events that occurred. But the veracity of a witness is not to be considered at the summary judgment state," Pet. App. 70a. In effect, the court reasoned that because the court could not assess credibility on summary judgment, the court must, *ipso facto*, assume that Detective Norton's testimony was truthful. *Id*. That was a bridge too far for the court of appeals. *See, e.g., E.g., Reeves,* 530 U.S. at 541*; Bryant* 432 F.3d 1114, 1126 (reversing a district courts' grant of summary judgment, the court held that where the non-movant casts sufficient

43. Dkt. 274-2 (Swenson Dep. p. 119, l. 1-3).

doubt on parts of the movant's factual assertions, "the jury need not believe the [summary judgment movant's] remaining reasons"); *Cross v. United States*, 336 F.2d 431, 433 (2d Cir. 1964) (holding that summary judgment is inappropriate where "the disputed questions of fact turn exclusively on the credibility of movants' witnesses.") § 10A Charles Alan Wright & Arthur R. Miller, 10A Fed. Prac. & Proc. Civ. § 2726 (3d ed.) (citing numerous cases). But then the court of appeals reached the same result by a different bridge. It stated that it was "reasonable to infer from Deputy Bryon's testimony" that Bryon could see Mr. Murray and could corroborate Defendant Norton's testimony. Pet. App. 16a, and therefore, that a "reasonable jury" should enter a verdict consistent with the officers' testimony. Pet. App. 16a-17(a). In reaching that conclusion, the court of appeals neglected to mention that the photograph and numerous other pieces of evidence contradicted both officers, and that Bryon's testimony "corroborating" his colleague, Detective Norton, was something that Byron did not put in his police report and apparently did not tell anyone until he allegedly recalled it, years later, while being deposed. Byron was at a loss to explain why information this important had been omitted from his official police report.[44]

The court of appeals also fails to mention that a reasonable jury could view the alleged corroboration as evidence Mr. Murray was attempting to surrender to avoid Norton shooting Murray, and that the stories of the officers at the scene contradicted each other regarding where the officer were, what they saw, and what they said or heard.

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44. Dkt. 274-8, p. 8-9; Dkt. 328-3, p. 18-19.

In sum, the State officers' stories were inconsistent, appeared to be contrary to the physical evidence that was gathered, and the officers chose not to gather the key evidence that would have definitively proven or disproven their colleague's story. This Court should use this case to remind the lower courts that until a summary judgment movant satisfies the first step in the two step process, the courts cannot go on to the second step.

CONCLUSION

Petitioners respectfully request that this Court grant the Petition for a writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED DECEMBER 29, 2015

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-4040, No. 14-4144

DEBRA JONES AND ARDEN C. POST, INDIVIDUALLY AND AS THE NATURAL PARENTS OF TODD R. MURRAY; DEBRA JONES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TODD R. MURRAY, FOR AND ON BEHALF OF THE HEIRS OF TODD R. MURRAY,

Plaintiffs - Appellants,

v.

VANCE NORTON, VERNAL CITY POLICE OFFICER IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; VERNAL CITY; BLACKBURN COMPANY, D/B/A THOMAS-BLACKBURN VERNAL MORTUARY; DAVE SWENSON, IN HIS INDIVIDUAL CAPACITY; CRAIG YOUNG, IN HIS INDIVIDUAL CAPACITY; REX OLSEN, IN HIS INDIVIDUAL CAPACITY; JEFF CHUGG, IN HIS INDIVIDUAL CAPACITY; ANTHONEY BYRON, IN HIS INDIVIDUAL CAPACITY; BEVAN WATKINS, IN HIS INDIVIDUAL CAPACITY; TROY SLAUGH, IN HIS INDIVIDUAL CAPACITY; SEAN DAVIS, IN HIS INDIVIDUAL CAPACITY; UINTAH COUNTY,

Defendants - Appellees.

Appendix A

DEBRA JONES, INDIVIDUALLY AND AS THE NATURAL PARENT OF TODD R. MURRAY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TODD R. MURRAY, FOR AND ON BEHALF OF THE HEIRS OF TODD R. MURRAY; ARDEN C. POST, INDIVIDUALLY AND AS THE NATURAL PARENT OF TODD R. MURRAY,

Plaintiffs - Appellants,

v.

VANCE NORTON, VERNAL CITY POLICE OFFICER IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; VERNAL CITY; BLACKBURN COMPANY, D/B/A THOMAS-BLACKBURN VERNAL MORTUARY; DAVE SWENSON, IN HIS INDIVIDUAL CAPACITY; CRAIG YOUNG, IN HIS INDIVIDUAL CAPACITY; REX OLSEN, IN HIS INDIVIDUAL CAPACITY; JEFF CHUGG, IN HIS INDIVIDUAL CAPACITY; ANTHONEY BYRON, IN HIS INDIVIDUAL CAPACITY; BEVAN WATKINS, IN HIS INDIVIDUAL CAPACITY; TROY SLAUGH, IN HIS INDIVIDUAL CAPACITY; SEAN DAVIS, IN HIS INDIVIDUAL CAPACITY; UINTAH COUNTY,

Defendants - Appellees.

December 29, 2015, Filed

Appendix A

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH. (D.C. NOS. 2:09-CV-00730-TC-EJF AND 2:09-CV-00730-TC-BCW).

Before **BRISCOE**, **McKAY** and **BACHARACH**, Circuit Judges.

BRISCOE, Circuit Judge.

This case arises from the death of Ute Tribe member Todd R. Murray on April 1, 2007, following a police pursuit. Murray's parents Debra Jones and Arden Post, on behalf of themselves and Murray's estate, brought a 13-count complaint in the district court alleging various constitutional violations under 42 U.S.C. § 1983, conspiracy to violate civil rights under 42 U.S.C. § 1985, and state tort claims. These claims were alleged in varying permutations against nine individual law enforcement officers, their government employers, and a private mortuary (collectively, "Defendants"). Plaintiffs also sought sanctions against Defendants for alleged spoliation of evidence. The district court granted summary judgment to the mortuary on Plaintiffs› emotional distress claim, and to all remaining Defendants on all federal claims. The court also dismissed as moot Plaintiffs› motion for partial summary judgment on the status of Indian lands, and denied Plaintiffs› motion for spoliation sanctions. The district court declined to exercise supplemental jurisdiction over the remaining state law torts after disposing of the emotional distress claim and the federal claims. Costs were taxed in favor of Defendants, and the

court denied Plaintiffs› motion to reconsider the taxation of those costs. Plaintiffs now appeal all of these rulings in two appeals. In Case No. 14-4040, we affirm the district court on each issue. As regards Case No. 14-4144, we affirm the district court›s denial of sanctions against the City of Vernal, but we dismiss the appeal of taxation of costs because we lack appellate jurisdiction.

I

On the morning of April 1, 2007, Trooper Dave Swenson of the Utah Highway Patrol was involved in a high-speed chase of a vehicle in which Murray was the passenger. At some point during the chase, Swenson conveyed to dispatch that the driver appeared to be a tribal male. The driver eventually ran off the road in a remote desert area within the Ute Tribe's Uncompahgre Reservation ("Reservation"). Trooper Swenson, who was in uniform, got out of his patrol car and shouted at the two men to stop and get on the ground. Plaintiffs contend that Murray paused for a moment before running from the car, but the trooper's dashboard camera video reveals no perceptible pause. Swenson did not see any weapons in Murray's hands or waistband. Murray and the driver ran in opposite directions, and Swenson notified dispatch that two "runners," both "tribal males," had fled on foot. Swenson pursued the driver, eventually arresting him.

Three nearby officers responded quickly to the chase: off-duty City of Vernal Police Detective Vance Norton, Utah Highway Patrol Trooper Craig Young, and Uintah County Sheriff's Deputy Anthoney Byron. When these

officers arrived, Swenson pointed them in Murray's direction. Norton, Byron, and Young then began searching the desert for Murray. None of these officers were cross-deputized to exercise law enforcement authority on the Reservation.

The search ended when Murray suffered a fatal gunshot wound to the head. Plaintiffs contend that Detective Norton shot Murray, but Defendants contend that Murray shot himself. Norton testified that as he crested a hill on foot, he saw Murray and shouted, "Police, get on the ground." App. Vol. III at 2410. Norton was wearing plain clothes, and estimates he was approximately 140 yards away from Murray. Murray did not get on the ground, but instead ran in Norton's general direction. As Murray drew closer, Murray fired a shot at Norton, which landed near Norton's feet. Detective Norton returned fire, shooting twice in rapid succession, and ran back up the hill he had just come down. When he reached what he believed to be a safe distance, he began to dial dispatch on his cell phone. While Norton attempted this call, he saw Murray "put the gun to his head. And I think I told him—once or twice screamed, you know, [p]ut the gun down, and then he pulled the trigger, and he just went straight down." App. Vol. XI at 3236. A later investigation conducted by the Federal Bureau of Investigation (FBI), which has exclusive jurisdiction to investigate incidents on the Reservation involving non-tribal law enforcement officers, revealed that Detective Norton's .40 caliber shell casings were 113 yards from where Murray was shot. When Norton reached dispatch, he notified them that Murray "just shot himself in the head" and requested an ambulance. App. Vol. VI at 1827.

In the meantime, before shots were fired, Deputy Byron and Trooper Young were also searching for Murray. Byron testified that he and Young were walking through a gully, and saw Norton standing on the top of a hill. Byron heard "some crackling noise," but was not sure if it was a gunshot. App. Vol. VIII at 2420. As they made their way through the gully, Byron saw Murray "walking, and . . . swinging his arms." *Id.* Byron could not tell whether Murray was holding anything. Byron then again heard "crackling," could no longer see Detective Norton, and saw Murray "go[] from walking to going down." *Id.* Byron estimated he was at least 200 yards from Murray, and 400 to 500 yards from where he saw Norton on the top of the hill. He did not see anyone else.

Byron and Young then reunited with Norton on the hill where they had just seen him. Byron and Young proceeded down the hill, guns drawn, to where Murray was lying. Murray was on his back, bleeding from a gunshot wound to the head. He was unconscious, but still breathing. Trooper Young testified that he saw a .380 caliber gun and casings on the ground near Murray. Byron rolled Murray from his back onto his side and handcuffed him while Young kept his weapon aimed at Murray. None of the officers attempted to provide first aid or any other assistance. Murray remained unconscious, lying on his right side and handcuffed, until the ambulance arrived.

Plaintiffs vehemently dispute Detective Norton's and Deputy Byron's testimony that Murray shot himself. Plaintiffs believe Norton shot Murray "execution-style" at close range and planted the .380 caliber gun found near

Murray's body. To support their theory, Plaintiffs point principally to the fact that Murray was right-handed, but the shot entered the left side of his head. Plaintiffs' various experts in police procedures opined that a conclusion that a right-handed person inflicted a gunshot wound to the left side of his own head is suspicious, and it is usually necessary to corroborate that conclusion with other forensic trace evidence, such as blood blowback on the victim's hands.

The remaining individual Defendants arrived either in the half hour before the ambulance arrived, or shortly after the ambulance took Murray to the hospital and their minor involvement need not be recited. These Defendants are: Division of Wildlife Resource Investigator Sean Davis, Uintah County Sheriff's Deputies Troy Slaugh and Bevan Watkins, Utah Highway Patrol Trooper Rex Olsen, and Utah Highway Patrol Lieutenant Jeff Chugg.

Agent Rex Ashdown, the FBI agent assigned to the investigation, arrived after Murray was taken to the hospital. Neither the FBI, nor any FBI agents are named defendants in this lawsuit. According to Ashdown, officers at the scene told him that Murray shot himself, and this "influence[d]" how he went about the investigation. App. Vol. XVII at 5545. Ashdown admits he took some information from the officers "at face value." *Id.* at 5560. Agent Ashdown: (1) took custody of the .380 gun and shell casings found near Murray, but did not order any testing; (2) did not confiscate Detective Norton's gun or order any testing; and (3) did not confiscate either Murray's or any of the officers' clothing, testifying later that Norton's clothes

and hands appeared clean. Agent Ashdown retired about two months later.

After Agent Ashdown retired, FBI Agent David Ryan took over the investigation of Murray's death. The FBI later used the .380 caliber weapon as evidence in an unrelated prosecution, and the gun was destroyed after the conclusion of that prosecution pursuant to a court order in that case. Although Agent Ryan knew the gun was evidence in an officer-involved shooting, he did not notify the Utah Highway Patrol, the Uintah County Sheriffs, or the City of Vernal Police that it was going to be destroyed. Nor did he attempt to prevent the gun from being destroyed.

Detective Norton's gun and shell casings were recovered from the scene. As far as the record reveals, the casings are still in the possession of Vernal City police. After Murray's death, Vernal Chief of Police Greg Jensen, not a defendant here, inspected Norton's gun visually, kept it for several days, and then returned it to Norton.

While the investigation at the scene was underway, Murray was taken to a hospital in Vernal, Utah, where he was pronounced dead. Deputy Byron, who had accompanied the ambulance to the hospital, was joined there by two other officers who are not defendants in this action. After Murray's death, the three men began what they later claimed was evidence collection: taking photographs of Murray's body, gathering his clothing in bags, and putting bags over Murray's hands. A member of the hospital staff drew a vial of blood from Murray's body

at the officers' request. One of the officers took Murray's clothes and the blood, but it is unknown what became of these items.

Deputy Byron placed his index finger in both of Murray's head wounds. According to Byron, he did this to determine the location of the entrance wound and the exit wound. But Plaintiffs' experts testified that this tampering was not only unusual, but potentially harmful to the investigation. One expert stated that in his thirty years of experience in police practices, he had "never heard or seen an instance where a law enforcement officer inserted a finger into a gunshot wound prior to examination by the medical examiner," which "can introduce contamination, remove evidence and alter the appearance of the wound." App. Vol XVIII at 5688. Even experts retained by Defendants agreed that there was no reason for the "turning, moving of limbs, [and] undressing" of Murray, and that probative trace evidence could have been lost as a result. App. Vol VI at 1628-29. Nonetheless, Dr. Edward Leis, the Deputy Medical Examiner who performed the official medical examination of Murray's body, testified that any potential contamination caused by the officers' meddling would not have altered his determination regarding the location of the entry and exit wounds or his conclusion that Murray died of a self-inflicted gunshot wound. Dr. Leis is not a defendant in this action.

Murray's body was transported from the hospital to The Blackburn Company ("Blackburn"), a mortuary and funeral home, where it was kept until the medical

examiner's office could retrieve it the following day. Colby DeCamp, a mortuary apprentice, was asked by law enforcement officers to draw blood. DeCamp, who is also not a defendant in this action, testified that he remembered at least the following officers were present: Chief Jensen, Detective Norton, and Keith Campbell (a Deputy Medical Examiner and a Deputy Sheriff, not a defendant). In order to draw the blood, DeCamp made an incision in Murray's neck, which he testified is a common practice used to draw blood from deceased persons who have sustained significant blood loss. After drawing the blood, DeCamp immediately gave the sample to the officers, but it is unknown what became of the blood sample after that. Plaintiffs described the incision as a "jagged-gash" on Murray's remains. App. Vol. IV at 1231. Plaintiffs believe the incision in the neck was an effort to send a threatening message to Murray's family, but DeCamp testified that he did not know Murray or his family, nor did he believe that the incision would cause emotional distress.

The following day, Murray's body was taken to the Utah State Office of the Medical Examiner where Dr. Leis performed an examination. Dr. Leis testified that he did not believe Murray's injury was survivable, or at least Murray would have remained "in a chronic vegetative state," App. Vol. XVII at 5537, and thus the officers who were at the scene could not have saved his life by administering aid. Plaintiffs' forensics experts opined that "many victims of gunshot injuries to the head survive," App. Vol. XIII at 3789, and that Murray's injury "would not be considered universally . . . fatal," App. Vol. XVIII at 5687, but these experts did not offer evidence that Murray's particular injury was surviveable.

Although Agent Ashdown requested that a full autopsy be performed, Dr. Leis decided to conduct only an external physical examination. According to Dr. Leis, after performing the external physical examination and reading a preliminary report prepared by Keith Campbell the prior evening, he concluded that a full autopsy was unnecessary. A full autopsy might have revealed more information about the trajectory and type of bullet that killed Murray, as well as whether there was any evidence of a struggle which may have preceded his death.

Dr. Leis determined that the wound on the left side of Murray's head was the entrance wound and that the wound on the right was the exit wound. Because of soot in the entrance wound and surrounding abrasions to the skin, Dr. Leis concluded that the gun was in close proximity to the skin when it was discharged, and described the entry wound as a "contact wound." *Id.* at 3364. Dr. Leis completed a death certificate that listed the cause of Murray's death as suicide resulting from a gunshot wound to the head.

II

Following Murray's death, Plaintiffs filed a civil suit in Utah state court, which included numerous claims. The State of Utah, no longer a party, removed the action to federal court. After entering several rulings, the district court has now disposed of all claims contained in the Plaintiffs' third and final amended complaint. The district court first entered summary judgment in favor of Blackburn on Plaintiffs' claim of intentional infliction of

emotional distress. The district court also twice denied Plaintiffs leave to amend their emotional distress claim. The district court then ruled that the United States' treaty with Murray's tribe, the Ute, did not give rise to a private right of action against municipalities or individuals enforceable through 42 U.S.C. § 1983, and dismissed that count on the pleadings. The district court then issued a trio of opinions, granting summary judgment to all municipal and individual Defendants on the remaining civil rights claims (unlawful seizure, excessive force, failure to intervene, and conspiracy), dismissing the remaining state tort claims, and dismissing as moot Plaintiffs› motion for partial summary judgment on the status of Indian lands. The district court also denied Plaintiffs› motion to reconsider an earlier ruling that the Utah Governmental Immunity Act applies to the defendant officers. Finally, the district court denied Plaintiffs› request for sanctions against all individual Defendants and Uintah County for alleged spoliation of evidence, but reserved judgment on whether the City of Vernal might be liable for sanctions. After further argument, the district later denied those sanctions as well.

After the entry of final judgment in this case, the district court taxed costs against Plaintiffs. Plaintiffs› subsequent request for reconsideration of the taxation of costs was denied. We conclude we have jurisdiction under 28 U.S.C. § 1291 to address all issues raised in both Case Nos. 14-4040 and 14-4144, except the taxation of costs.

III

We have divided Plaintiffs' substantive and procedural claims into the following groups: (1) 42 U.S.C. § 1983 claims for unlawful seizure, excessive use of force, and failure to intervene in the violation of constitutional rights; (2) 42 U.S.C. § 1983 claim for violation of individual rights under the Ute Treaty; (3) 42 U.S.C. § 1985 claim for conspiracy to violate civil rights; (4) state law tort claims of intentional infliction of emotional distress, wrongful death, and assault and battery; (5) spoliation sanctions; and (6) taxation of costs.

1. Unlawful seizure, excessive force, and failure to intervene

The district court granted summary judgment to all Defendants on Plaintiffs' claims of unlawful seizure, excessive force, and failure to intervene in the ongoing violation of constitutional rights, all brought under 42 U.S.C. § 1983. We review the grant of summary judgment de novo. *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1215 (10th Cir. 2013). We view the facts in the light most favorable to the nonmovant and draw all reasonable inferences in the nonmovant's favor. *Id.* Summary judgment is appropriate only if "there is no genuine dispute as to any material fact." *Id.* (quoting Fed. R. Civ. P. 56(a)). "A fact is 'material' if, under the governing law, it could have an effect on the outcome of the lawsuit. A dispute over a material fact is 'genuine' if a rational jury could find in favor of the nonmoving party on the evidence presented." *Id.* (quoting *Equal Emp't Opportunity Comm'n v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1190 (10th Cir. 2000)).

We first dispense with Plaintiffs' unlawful seizure claims, and the remaining constitutional claims unravel from there. Plaintiffs argue that Detective Norton, Trooper Young, and Deputy Byron seized Murray without probable cause or reasonable suspicion. They also allege these officers, along with Trooper Swenson, unconstitutionally pursued and seized Murray on Reservation land where they have no jurisdiction, even if arguably they had cause. Plaintiffs argue further that the officers' employers, Uintah County and the City of Vernal, failed to properly train and supervise the officers, or alternatively, implemented policies and procedures that were deliberately indifferent to Murray's rights.

In order for Plaintiffs to succeed on their unlawful seizure claims, there must have been a seizure which invokes the protections of the Fourth Amendment. A seizure occurs when "an individual remains in the control of law enforcement officials because he reasonably believes, on the basis of their conduct toward him, that he is not free to go." *Michigan v. Chesternut*, 486 U.S. 567, 577, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988).

Plaintiffs contend the following events are seizures: (1) Trooper Swenson's order to Murray to get on the ground at the conclusion of the car chase, (2) the search for, and closing in on Murray, and (3) Murray's fatal gunshot wound, which Plaintiffs believe was inflicted by Detective Norton, not Murray himself. The district court ruled that no reasonable jury could find for Plaintiffs on any of these theories.[1]

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1. It is undisputed that Deputy Byron's handcuffing Murray was an unlawful seizure of a tribal member on tribal land. *See Ross*

Plaintiffs' first theory is that Murray "momentarily halted" when Trooper Swenson commanded him to stop as he got out of the pursued vehicle. Aplt. Br. at 40. But the dashboard camera video demonstrates that there was no submission, not even an ephemeral one. *See California v. Hodari D.*, 499 U.S. 621, 626, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991) (explaining that an officer's command to halt is not a seizure until the person actually submits to the command); *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (in the context of a videotape: "[W]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should adopt that version of the facts for purposes of ruling on a motion for summary judgment."). Thus, we conclude, Swenson never seized Murray.

Second, Plaintiffs argue that, under a totality of the circumstances, the officers had seized Murray in the moments before Murray was shot, even if he shot himself. Aplt. Br. at 40 (citing *Jones v. Hunt*, 410 F.3d 1221, 1226 (10th Cir. 2005) (reciting several factors which contribute to a seizure)). In relevant part, *Jones* points out that the threatening presence of officers, brandishing of a weapon, aggressive tone of voice, interaction in a nonpublic place, and absence of other members of the public can contribute to finding a seizure. 410 F.3d at 1225-26. Here, Detective Norton, who was in a remote area but at a distance from Murray, ordered Murray to the ground. It is also

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v. Neff, 905 F.2d 1349, 1353-54 (10th Cir. 1990). The district court ruled that Byron was entitled to qualified immunity. Plaintiffs do not challenge this ruling on appeal.

reasonable to infer from Deputy Byron's testimony that he and Trooper Young could see Murray, that Murray reciprocally was aware of Byron and Young as well. It is also undisputed that Norton fired two shots at Murray.

However, no reasonable jury could find a seizure had occurred in the moments before shots were fired because there is no evidence that Murray ever submitted to any show of authority. Even if one assumes Murray heard Norton's shouts from over 100 yards away, Norton testified that Murray began running toward him and fired at him, rather than submitting. Additionally, even if we assume Murray was aware of Byron and Young in the other direction, there is no indication that Murray submitted to their presence. Nothing in the officers' actions "terminate[d] [Murray's] movement" or otherwise caused the officers "to have physical control" over Murray. See *Brooks v. Gaenzle*, 614 F.3d 1213, 1223-24 (10th Cir. 2010).[2]

Finally, Plaintiffs argue that Murray did not shoot himself, but that Detective Norton shot him at close range, thereby effectuating a seizure. Our best understanding of Plaintiffs' theory is this: Norton had the .380 weapon found near Murray, caught up to Murray either in his vehicle or on foot, used either the .380 or his .40 caliber weapon to shoot Murray at close range, and planted the .380 near Murray. To support this theory, Plaintiffs offer

2. Plaintiffs argue that if Murray shot himself, his suicide would constitute a seizure because it was motivated by being "caught." Aplt. Br. at 41 n.74; Aplt. Reply Br. at 19. However, Plaintiffs provided no authority upon which to base such a conclusion.

these facts: (1) that Murray was right-handed, but the entrance wound was on the left side of his head; (2) Trooper Swenson did not see any weapons on Murray when he ran from the car; and (3) no blood or tissue "blowback" was documented on Murray's left hand or on the .380 firearm recovered near him.

These facts could not lead a reasonable jury to conclude that Detective Norton inflicted Murray's fatal contact wound. To the contrary, this extensive record could only lead a reasonable jury to conclude that no other person, including Detective Norton, was within 100 yards of Murray when he was shot, and so Murray is the only person who could have inflicted a contact wound. Norton testified that he saw Murray shoot himself from an estimated 140 yards away. Plaintiffs argue that Norton's testimony should be disregarded because he is the accused officer. But even if this court were to disregard Norton's testimony, the remainder of Defendants' evidence remains uncontroverted. Deputy Byron testified that he heard crackling and saw Murray fall to the ground immediately after seeing Detective Norton on a hill at a distance from Murray. Agent Ashdown found two shell casings from Norton's gun 113 yards away from where Murray fell, and observed that Norton had no blood on him when he was seen immediately after Murray was shot. Plaintiffs do not contest the medical evidence that Murray died of a contact wound, and Plaintiffs fail to present any evidence that anyone else got close to Murray. Thus, although the question of who inflicted Murray's fatal gunshot wound is certainly material, there is no genuine dispute of fact that the shooter was anyone but Murray himself.

Without a seizure, there can be no violation of the Fourth Amendment and therefore no liability for the individual Defendants. In the absence of a seizure we need not address the tribal status of lands on which the purported seizures occurred. As for the City of Vernal and Uintah County, "[w]hen there is no underlying constitutional violation by a[n] . . . officer, there cannot be an action for failing to train or supervise the officer." *Apodaca v. Rio Arriba Cty. Sheriff's Dep't*, 905 F.2d 1445, 1447-48 (10th Cir. 1990) (citing *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986)).

Additionally, without a seizure, there can be no claim for excessive use of force in effectuating that seizure. *See County of Sacramento v. Lewis*, 523 U.S. 833, 843-44, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). That leaves Plaintiffs' claim of excessive use of force in violation of the Due Process Clause of the Fourteenth Amendment.[3] *Id.* The core concept of due process protection against excessive use of force is the protection against government action which is arbitrary or "shocks the conscience." *Id.* at 845-46. "[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Id.* at 846 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 129, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)).

3. Although Plaintiffs briefed for this court the protections of substantive due process under the Fifth Amendment, we interpret their arguments under the Fourteenth Amendment because they seek relief against state, rather than federal, actors.

As the application of force, Plaintiffs point to "brandish[ing] and threaten[ing] deadly force," apparently referring to Norton firing at Murray, and Byron and Young approaching him with their guns drawn after he was down. Aplt. Br. at 43. Plaintiffs attempt to rely on *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981), to argue the officers here used excessive force. However, *Black* is unhelpful to Plaintiffs because there, a plainclothes detective, who did not identify himself, aimed his service weapon at a man's head in an unprovoked road rage incident, with the man's wife also in the line of fire. 662 F.2d at 183-85. Here, Plaintiffs offered no evidence to counter Detective Norton's testimony that Murray fired first and Detective Norton returned fire. With respect to Deputy Byron and Trooper Young's armed approach of Murray after he was down, Murray was unconscious and would not have been aware of the weapons, nor did the officers apply any force directly to Murray.[4] The record contains no evidence that these two officers ever fired at or verbally threatened Murray.

Therefore, nothing about the officers' approach toward Murray shocks the conscience or was arbitrary. We affirm the district court's grant of summary judgment to Defendants on the excessive force claim. As with the unlawful seizure claims, the municipalities are not liable in the absence of a constitutional violation. *Apodaca*, 905 F.2d at 1447-48.

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4. Deputy Byron did handcuff Murray, but Plaintiffs do not argue on appeal that he used excessive force in doing so.

Without either an unlawful seizure or an excessive use of force, Plaintiffs' claim that the nine individual Defendants are liable for a failure to intervene in the violation of constitutional rights also fails. In order to be liable for failure to intervene, the officers must have "observe[d] or ha[d] reason to know" of a constitutional violation and have had a "realistic opportunity to intervene." *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1210 (10th Cir. 2008) (quoting *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994)).

Plaintiffs focus their arguments on the officers' opportunities to intervene, but ignore the requirement that the officers must have knowledge of a constitutional violation. While this court has not directly stated as much, other circuits have acknowledged that "[i]n order for there to be a failure to intervene, it logically follows that there must exist an underlying constitutional violation[.]" *See Harper v. Albert*, 400 F.3d 1052, 1064 (7th Cir. 2005). We are unaware of any failure to intervene case in which this court has reversed either a grant of summary judgment or qualified immunity to a government actor without first finding at least a genuine issue of material fact as to an underlying constitutional violation. *Cf. Estate of Booker v. Gomez*, 745 F.3d 405, 422-23 (10th Cir. 2014) (denying summary judgment and qualified immunity to government defendants on failure to intervene in excessive use of force where plaintiffs' genuinely disputed facts, if true, would constitute a clearly established excessive use of force); *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1283-85 (10th Cir. 2007) (reversing grant of summary judgment to government defendants on failure to intervene claim

where genuine issues of material fact remained on excessive use of force claim). We therefore affirm the district court's grant of summary judgment to Defendants on the failure to intervene claim.

2. Violation of Ute Treaty

Plaintiffs brought a claim under 42 U.S.C. § 1983, alleging that all of the individual Defendants violated Murray›s rights under the "Ute Treaty"[5] between the Ute Tribe and the United States. The district court dismissed the Treaty claim on the pleadings, concluding that the Ute Treaty does not confer an individual right for which § 1983 provides a remedy against individuals or municipalities. Instead, the district court concluded, the Treaty only creates an individual right against the United States, which must be enforced directly through the Treaty itself. We review a dismissal for failure to state a claim de novo. *Seattle-First Nat'l Bank v. Carlstedt*, 800 F.2d 1008, 1011 (10th Cir. 1986).

Section 1983 is not an independent source of rights, but rather a vehicle through which one may vindicate rights conferred elsewhere in the Constitution and laws of the United States. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285,

5. Two treaties comprise the "Ute Treaty" at issue here. An 1863 Treaty created the Uncompahgre Reservation, and an 1868 Treaty contains the language Plaintiffs argue confers a right enforceable via § 1983. See Treaty with the Utah Tabeguache Band, Oct. 7, 1863, 13 Stat. 673; Treaty with the Ute, art. 6, Mar. 2, 1868, 15 Stat. 619. As Plaintiffs do, we read the two treaties together, referring to them as one "Ute Treaty."

122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002). It is the violation of these federally-conferred rights, not merely violations of federal law, which give rise to § 1983 actions. *Id.* at 282-83. Plaintiffs argue these rights arise here from the "Bad Men Clause"[6] of the Ute Treaty:

> If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

Treaty with the Ute, art. 6, Mar. 2, 1868, 15 Stat. 619.

Even though the Treaty can be read to grant individual rights to Ute members, the text is clear that those rights only arise directly *against the United States*, and must be enforced through the mechanism prescribed in the Treaty, rather than the general § 1983 remedy. The remedy for Plaintiffs› claimed wrongs is that "the *United*

6. Several treaties between the United States and various Native American tribes contain similar or identical language, commonly referred to as a "Bad Men Clause." *See* Lillian Marquez, *Making Bad Men Pay: Recovering Pain and Suffering Damages for Torts on Indian Reservations under the Bad Men Clause*, 20 Fed. Cir. B.J. 609, 610-13 (2010-2011).

States will . . . reimburse the injured person for the loss sustained" and cause the "bad men" to be arrested if his acts were criminal. Treaty with the Ute, 15 Stat. at 620 (emphasis added).

Other courts have come to the same conclusion on similar Bad Men Clauses.[7] *E.g., Hebah v. United States*, 428 F.2d 1334, 1335-36, 1339-40, 192 Ct. Cl. 785 (Ct. Cl. 1970) (holding for the first time that the Bad Men Clause does give rise to individual rights, and plaintiff could sue the United States directly for reimbursement of damages she suffered from her husband's death at the hands of the Indian Police Force); *Tsosie v. United States*, 825 F.2d 393, 394, 398 (Fed. Cir. 1987) (holding that an identical Bad Men Clause permitted individual "reimbursement from the federal treasury" after suffering an assault at the hands of a U.S. Public Health Service hospital employee); *Elk v. United States*, 87 Fed. Cl. 70, 72-73, 78-79 (Fed. Cl. 2009) (permitting a member of the Oglala Sioux Tribe to recover directly from the United States under an identically worded treaty for an assault perpetrated by a U.S. Army recruiter).

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7. The Court of Federal Claims, in parallel litigation to this case, ruled that it had jurisdiction pursuant to the Ute Treaty Bad Men Clause to address at least some of Plaintiffs' claims against the individual defendants here, as well as the FBI and Bureau of Indian Affairs officials involved. *Jones v. United States*, 122 Fed. Cl. 490, 517-23 (Fed. Cl. July 30, 2015), *appeal docketed*, No. 15-5148 (Fed. Cir. Sept. 10, 2015). The Court of Federal Claims dismissed the action, however, because the district court's factual findings in this case resulted in issue preclusion. *Id.* at 523-30.

This reading of the Ute Treaty also comports with the Supreme Court's statements that a well-developed enforcement mechanism granted directly through a statute will foreclose the ability to pursue a § 1983 action. *See Gonzaga*, 536 U.S. at 284-85 n.4; *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423, 426, 107 S. Ct. 766, 93 L. Ed. 2d 781 (1987) (noting that where a comprehensive scheme provided for private actions, Congress expressed an intent to foreclose remedies under § 1983, but where the statute or its regulations had "never provided a procedure by which [persons] could complain . . . about the alleged [violations]," § 1983 action was not precluded); *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981).

While Plaintiffs cite several cases which they argue support their filing of a § 1983 action to enforce their treaty rights, each of these cases either hold that the treaties at issue do not provide a § 1983 remedy, or grant a § 1983 remedy based on treaty language that is not present in the Ute Treaty. *E.g., Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 662-63 (9th Cir. 1989) (finding no § 1983 remedy); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118, 1122, 1125-26 (D. Minn. 1994) (permitting a § 1983 action based on "the privilege of hunting, fishing, and gathering"). If anything, these cases stand for the accepted premise that the specific language of a treaty determines whether that treaty gives rise to a § 1983 remedy. We agree with the district court that the Ute Treaty does not provide for a § 1983 remedy, and affirm the district court›s dismissal of Plaintiffs› treaty violation claim.

3. Conspiracy to violate civil rights under 42 U.S.C. § 1985(2) and (3)

Plaintiffs claim that the individual Defendants conspired to obstruct justice, and to violate Murray's civil rights, in violation of 42 U.S.C. § 1985(2) and (3), respectively. The district court granted summary judgment to Defendants on both conspiracy claims.

The relevant portion of § 1985(2) provides a right of action "if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws." 42 U.S.C. § 1985(2). Section 1985(3), clause 1, provides a right of action "[i]f two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws." 42 U.S.C. § 1985(3).

Among other elements, both causes of action require a showing of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators› action." *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971); *see also Murray v. City of Sapulpa*, 45 F.3d 1417, 1423 (10th Cir. 1995); *Smith v. Yellow Freight Sys., Inc.*, 536 F.2d 1320, 1323 (10th Cir. 1976). The focus of the racial animus inquiry is the government actor's "intent, motive, or purpose." *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 647 (10th Cir. 1988). To avoid summary

judgment, Plaintiffs must point to "specific, nonconclusory evidence" that the Defendants' actions were "improperly motivated." *Id.* at 650.

Plaintiffs' only support for their racial animus theory is that some of the officers were aware of Murray's race, there was "significant racial tension" in the local culture, and that "[t]he only plausible explanation for the abusive way that [Defendants] handled every aspect of this incident," and the "brazen and flagrant" "evidence tampering" is "racial bias." App. Vol. XVIII at 5791. These facts, even if fully accepted and considered together, do not amount to the specific, nonconclusory evidence of invidiously race-based animus required to avoid summary judgment on a conspiracy claim. Trooper Swenson's identification of the vehicle's occupants as "tribal males" to dispatch was merely descriptive. There is no evidence that Norton, Byron, or Young pursued Murray on foot because of his race, even if we assume they heard Trooper Swenson identify the vehicle's occupants as such. The remaining officers arrived well after Murray was shot, and there is no evidence that their behavior was based on racial or any other animus. We therefore affirm summary judgment in favor of the individual Defendants on Plaintiffs' § 1985(2) and (3) claims.

4. State law torts

Plaintiffs brought a claim of intentional infliction of emotional distress ("IIED") against Blackburn, and claims of wrongful death and assault and battery against Detective Norton. We first address the IIED claim.

Plaintiffs alleged that Blackburn, the funeral home and mortuary where Murray's body was temporarily housed on the day of his death, is vicariously liable for emotional distress they experienced based on their later seeing the incision made on Murray's neck. The district court granted Blackburn summary judgment, and denied Plaintiffs leave to amend their IIED claim.

When a plaintiff is not present during the allegedly tortious act, Utah law requires, among the other elements of an IIED claim, that the defendant committed the act with the intention of inflicting injury upon the absent plaintiff. *Hatch v. Davis*, 2006 UT 44, 147 P.3d 383, 388 (Utah 2006). Plaintiffs' IIED claim fails because it is undisputed that they were not present when the incision was made and they cannot demonstrate that Blackburn apprentice Colby DeCamp intended to inflict any injury upon Plaintiffs. DeCamp testified that he did not know Murray or the Plaintiffs at the time, and that he made the incision only at the request of law enforcement officers to obtain a blood sample. Plaintiffs do not dispute this testimony, but merely argue "the very nature of the desecration itself," *i.e.*, the appearance of the incision, satisfies the "presence" requirement. Aplt. Br. at 52. But Plaintiffs offer no authority to support this argument. Summary judgment in favor of Blackburn on the IIED claim is affirmed.

Relatedly, Plaintiffs take issue with the district court's denial of their two requests for leave to amend their complaint with respect to the IIED claim. In general, leave to amend a complaint should be freely granted "when

justice so requires." Fed. R. Civ. P. 15(a)(2). However, if the amendment would be futile, we will uphold the denial of a requested amendment. *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1018 (10th Cir. 2013). A denial of leave to amend a complaint is reviewed for abuse of discretion. *Id.* Where the reason for denial of leave to amend is futility, we review de novo the legal basis for the finding of futility. *Id.*

Plaintiffs first sought leave to add DeCamp and Vernal Police Chief Greg Jensen individually as defendants in the IIED claim. Adding DeCamp and Jensen would be futile because the statute of limitations had already run when Plaintiffs sought this amendment. *Cabaness v. Thomas*, 2010 UT 23, 232 P.3d 486, 496 (Utah 2010) (noting that the IIED statute of limitations is four years); Blackburn Supp. App. at 11. We see no "mistake concerning the proper party's identity" such that the amendment would relate back, *see* Fed. R. Civ. P. 15(c)(1)(C), and, as a result, no abuse of discretion by the district court in denying this amendment.

After entry of summary judgment in favor of Blackburn, Plaintiffs again sought leave to amend their complaint, this time to add negligence and other torts of lesser fault. However, as Plaintiffs acknowledge, their request was a year late under the district court's scheduling order. Plaintiffs asked the district court to modify its scheduling order, but the district court refused. Plaintiffs' argument that they "could not have anticipated" the entry of summary judgment in favor of Blackburn is unpersuasive. App. Vol. V at 1433. The district court's denials of Plaintiffs' requests for leave to amend their IIED claim are affirmed.

In addition to its IIED claim against Blackburn, Plaintiffs alleged state law claims of wrongful death and assault and battery against Detective Norton. After resolving Plaintiffs' federal claims in favor of Defendants, the district court declined to retain supplemental jurisdiction and dismissed these claims without prejudice. We review that decision for abuse of discretion. *Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1139 (10th Cir. 2004). Plaintiffs provide no basis for a conclusion that the district court abused its discretion in failing to retain jurisdiction over these state law claims.

5. Sanctions for spoliation of evidence

Plaintiffs appeal the district court's denial of their requested sanctions for alleged spoliation of evidence. Plaintiffs sought default judgment and the application of adverse inferences against all individual and government Defendants, as well as lesser sanctions in the alternative. Sanctions for spoliation of evidence are reviewed for abuse of discretion. *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007). "[W]e accept the district court's factual findings unless they are clearly erroneous." *Id.*

A spoliation sanction is proper where: "(1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence." *Turner v. Pub. Serv. Co. of Colorado*, 563 F.3d 1136, 1149 (10th Cir. 2009) (quoting *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007)). The

entry of default judgment or the imposition of adverse inferences require a showing of bad faith. *Id.* (adverse inferences); *Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1321 (10th Cir. 2011) (default judgment). "Mere negligence in losing or destroying" evidence is not enough to support imposition of either of these harsh sanctions. *Turner*, 563 F.3d at 1149 (quoting *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997)).

Plaintiffs argue that they were prejudiced by Defendants' spoliation or complete loss of the following evidence: (1) Murray's testimony, because officers failed to administer life-saving aid to Murray at the scene; (2) the .380 caliber firearm attributed to Murray; (3) Detective Norton's .40 caliber firearm; and (4) any trace evidence that could have been recovered from the scene, Murray's body and clothes, or Detective Norton's body, clothes, or vehicle on the day of the shooting. Plaintiffs believe that this evidence would have tended to show that Murray did not shoot himself, but was instead shot by Detective Norton. Plaintiffs ask this court to find that the Defendants acted in bad faith because "[n]o [other] reasonable justification exists for Defendants' disregard for the evidentiary duties they were under." Aplt. Br. at 27.

With respect to preserving Murray's life, and therefore his testimony, the district court found, based on Dr. Leis' testimony, that Plaintiffs were not prejudiced because Murray's injuries were not survivable. We see no clear error in the district court's consideration of the medical facts, and therefore agree that the failure to administer aid did not result in prejudice to Plaintiffs' case.

Regarding the destruction of the .380 caliber weapon found near Murray, the district court did not abuse its discretion in denying sanctions because Defendants here lack the level of culpability required for the spoliation of evidence outside of their control. *See Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (sanctioned party had access to evidence for his own investigation, but did not notify other party); *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992) (listing culpability as a relevant factor in considering default judgment sanctions); *K-Con Bldg. Sys., Inc. v. United States*, 106 Fed. Cl. 652, 664 (Fed. Cl. 2012) (government allowed a witness to remove documents, and the witness then caused those documents to be destroyed). Once Agent Ashdown arrived, the FBI had exclusive jurisdiction over the investigation, and was entirely responsible for preserving the .380 caliber weapon as evidence and preventing its ultimate destruction. Neither Plaintiffs nor Defendants were notified in advance of the weapon's destruction.

Plaintiffs also contend the Defendants failed to preserve trace evidence that may have been recovered from Detective Norton's .40 caliber gun, such as blowback which would implicate it as the fatal weapon. Even if insufficient examination of Norton's gun may have prejudiced Plaintiffs, the district court did not abuse its discretion in finding that none of the Defendants here had a duty to preserve it. The persons with the most obvious responsibility for preserving that evidence, Agent Ashdown and Chief Jensen, are not parties to this litigation and therefore cannot be the subject of sanctions. It is arguable that Norton had an independent duty to

preserve any trace evidence on his own firearm because he, independent of the FBI investigation, could reasonably have anticipated litigation. However, the district court's rejection of this theory does not amount to an abuse of discretion.

Finally, Plaintiffs request sanctions for spoliation of trace evidence from the scene of the shooting, Murray and Detective Norton's skin and clothing, and from Norton's vehicle. Plaintiffs' strongest support for the imposition of sanctions is the conduct of Deputy Byron,[8] who accompanied Murray to the hospital, was involved in removing Murray's clothes and taking samples which have been lost, tampered with his body, and fingered Murray's head wound—all before the medical examiner had an opportunity to examine Murray's body. Plaintiffs' and Defendants' experts agreed that these actions could have contaminated or removed trace evidence, and were unnecessary and inappropriate.

Despite how disturbing Deputy Byron's behavior was, the district court found no prejudice resulting from

8. Arguments regarding failure to swab for gunshot residue, search for bullets, or inspect Norton's car are much weaker. Defendants presented unrebutted testimony that gunshot residue tests are unreliable and law enforcement agencies have therefore ceased using them. A gunshot residue test on Detective Norton would have added nothing to the investigation because he admitted to firing his weapon twice. The district court found that none of the Defendants had a duty to document the scene because it was within the province of the FBI. Plaintiffs have also failed to articulate what relevant evidence might have been gleaned from investigating Norton's vehicle.

these acts. Dr. Leis testified that potential contamination from Byron's actions would not have changed his ultimate conclusion regarding Murray's cause of death. None of the blood improperly extracted before the official medical exam was analyzed, and so the district court reasoned there was no prejudice because it was not used against Plaintiffs. The district court further noted that Plaintiffs failed to point to any specific relevant evidence that would have been found on Murray's clothing. The district court concluded Plaintiffs had not established any prejudice resulting from the handling of Murray's body after his death and therefore denied Plaintiffs' request for sanctions. Although these acts appear at best sloppy and unorthodox, and at worst suspicious, the district court's denial of sanctions was not an abuse of discretion.

6. Taxation of costs

After the district court entered final judgment, the state (Highway Patrol and DWR officers) and municipal (remaining individuals and municipalities) Defendants successfully sought costs, and Plaintiffs sought review of the clerk's taxation of costs. After Plaintiffs and Defendants submitted briefs on the costs issue, the district court referred the motion to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A). The magistrate judge issued a memorandum decision and order denying Plaintiffs› motion for review and upholding the clerk›s entry of costs. This order was not in the form of a recommendation, and was not reviewed or adopted by a district judge. The clerk then entered an amended final judgment, to include the costs. The state and municipal Defendants argue

that this court lacks jurisdiction to review the taxation of costs because the magistrate judge›s ruling is not an appealable order.

Plaintiffs had fourteen days to object from the date of the magistrate judge›s order under a § 636(b)(1)(A) referral. Fed. R. Civ. P. 72(a). Plaintiffs "may not assign as error a defect in the order not timely objected to." *Id.* Moreover, "[u]nder 28 U.S.C. § 636(b)(1)(A), a magistrate judge may not issue a final order directly appealable to the court of appeals." *S.E.C. v. Merrill Scott & Assocs., Ltd.*, 600 F.3d 1262, 1269 (10th Cir. 2010) (quoting *Hutchinson v. Pfeil*, 105 F.3d 562, 566 (10th Cir. 1997)).[9] We therefore lack appellate jurisdiction over the magistrate judge's order denying reconsideration of costs, and dismiss.

IV

With the exception of the taxation of costs under Case No. 14-4144, the judgment of the district court is affirmed in Case Nos. 14-4040 and 14-4144. Defendants' motion to dismiss for lack of jurisdiction is granted with regard to the taxation of costs, and denied with respect to all other issues. Plaintiffs' motion to seal Volume XIX of the record is granted. Plaintiffs' motion to file a supplemental appendix is denied.

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9. The grant of authority under 28 U.S.C. § 636(c) includes the ability to issue final appealable orders, but requires consent of the parties. 28 U.S.C. § 636(b) and (c)(3); Fed. R. Civ. P. 73(c); Phillips v. Beierwaltes, 466 F.3d 1217, 1220-22 (10th Cir. 2006). The parties here did not consent, either expressly or impliedly, and so even construed under § 636(c), the magistrate judge's order is not appealable.

APPENDIX B — ORDER AND MEMORANDUM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION, FILED MARCH 7, 2014

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:09-CV-730-TC

DEBRA JONES AND ARDEN C. POST, INDIVIDUALLY AND AS THE NATURAL PARENTS OF TODD R. MURRAY; AND DEBRA JONES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TODD R. MURRAY, FOR AND ON BEHALF OF THE HEIRS OF TODD R. MURRAY,

Plaintiffs,

vs.

VANCE NORTON, VERNAL CITY POLICE OFFICER IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; *et al.*,

Defendants.

March 7, 2014, Decided
March 7, 2014, Filed

ORDER AND MEMORANDUM DECISION

Appendix B

On April 1, 2007, after police officers' high speed car chase and subsequent foot pursuit of Todd Murray on the Uintah and Ouray Indian Reservation (the Reservation), Mr. Murray suffered a gun-shot wound to the head. Mr. Murray, who was twenty-one-years old and a member of the Ute Indian Tribe, died that same day in a local hospital. Mr. Murray's parents and Debra Jones, Mr. Murray's mother and the executor of his estate, filed this civil rights lawsuit, alleging that his death was caused by the unconstitutional acts of local law enforcement. This matter comes before the court on cross-motions for summary judgment.[1] For the reasons set forth below, the court finds that in all but one instance no unconstitutional violation occurred, and, in that one instance where a violation did occur, the officer is entitled to qualified immunity. Accordingly, the Defendants' motions for summary judgment are GRANTED and Plaintiffs' cross-motion is DENIED.

I. PROCEDURAL BACKGROUND

The Plaintiffs bring civil rights claims under 42 U.S.C. § 1983 and § 1985 against the municipalities of Uintah County and the City of Vernal, and against law enforcement officers, in their individual, as well as their official, capacities. The individual officers are four troopers with the Utah State Highway Patrol (Jeff Chugg, Dave Swenson, Craig Young and Rex Olsen); three Uintah

1. The Plaintiffs also filed a motion for default judgment against the Defendants on the basis of "Tampering and Destruction of Critical Evidence" or, in the alternative, spoliation sanctions. (Docket No. 258.) The court will address that motion in a separate order.

County Sheriff Deputies (Bevan Watkins, Troy Slaugh and Anthoney Byron); Sean Davis, who is an investigator with the Utah Division of Wildlife Resources (DWR); and Vance Norton, a detective with the Vernal City Police Department (collectively, the Individual Defendants). The Plaintiffs also allege two state law claims (assault/battery and wrongful death) against Detective Norton individually.[2]

In their § 1983 claims against the Individual Defendants, the Plaintiffs allege illegal seizure, excessive force, and failure to intervene to prevent the officers› unconstitutional acts. Under § 1985, they allege conspiracy to obstruct justice and conspiracy to violate Mr. Murray›s civil rights based on racial animus. (Vernal City is also named in the Plaintiffs› § 1985 conspiracy claims.) All of the Individual Defendants filed motions for summary judgment on the basis that no constitutional right was violated, but even if there were a violation, they are entitled to qualified immunity from the suit.[3] In response,

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2. The Plaintiffs originally brought thirteen causes of action. During the course of the litigation, the Eighth and Thirteenth Causes of Action were dismissed. (*See* March 29, 2013 Order (Docket No. 303); July 26, 2012 Order (Docket No. 216).) This order addresses the remaining eleven claims.

3. For the City and County Defendants, see Vernal City Detective Vance Norton's Motion for Summary Judgment (Docket No. 270), Uintah County Deputy Anthoney Byron's Motion for Summary Judgment (Docket No. 269), Uintah County Deputies Bevan Watkins' and Troy Slaugh's Joint Motion for Summary Judgment (Docket No. 266), and Uintah County and Vernal City's Joint Motion for Summary Judgment (Docket No. 271). For the State

the Plaintiffs filed a cross motion for partial summary judgment against the Individual Defendants on the illegal seizure, excessive force, and failure to intervene claims.[4]

The Plaintiffs also bring claims against Uintah County and the City of Vernal (collectively, the Municipalities), that employ many of the Individual Defendants. The Plaintiffs allege that the Municipalities failed to train or supervise their officers about jurisdictional limits on their law enforcement authority, probable cause to arrest, and the proper use of force, and failed to implement policies regarding the same.

Uintah County and Vernal City filed motions for summary judgment, arguing that (1) there was no violation of Mr. Murray's civil rights; (2) there is no respondeat superior liability under § 1983 and § 1985; (3) there is no evidence of a causal link between any constitutional violation and the Municipalities› alleged failure to train, supervise, or implement policies; and (4) the jurisdiction arguments fail because there is no evidence that the officers knew Mr. Murray was a member of the Ute Tribe until after Mr. Murray was shot and examined by the EMTs.

Defendants, see State Trooper Craig Young's Motion for Summary Judgment (Docket No. 275), State Trooper Dave Swenson's Motion for Summary Judgment (Docket No. 276), State Trooper Jeff Chugg's, State Trooper Rex Olsen's, and DWR Officer Sean Davis' Joint Motion for Summary Judgment (Docket No. 277).

4. (*See* Pls.' Mot. Partial Summ. J. (Docket No. 273).)

Appendix B

II. FACTUAL BACKGROUND[5]

A. THE CAR CHASE

On the morning of April 1, 2007, Mr. Murray was a passenger in a car driven by Uriah Kurip. Mr. Murray and Mr. Kurip were driving west on Highway 40 in Uintah County near Vernal, Utah. Trooper Dave Swenson of the Utah Highway Patrol was parked near mile marker 134.[6] Mr. Murray and Mr. Kurip drove past Trooper Swenson's parked patrol vehicle. Using his radar, Trooper Swenson recorded the car's speed at 74 miles an hour in a 65 miles-per-hour zone.

Trooper Swenson activated his overhead lights and began following the car, intending to make a traffic stop. Instead of stopping, Mr. Kurip drove faster. Trooper Swenson notified the dispatch officer that he was involved in a high-speed chase. For approximately thirty minutes, Trooper Swenson pursued the car, in and out of the

5. The Plaintiffs have filed two unopposed motions to supplement the record (*see* Docket Nos. 407 and 408). In their motions, they list documents (such as complete deposition transcripts) that the court requested post-briefing. They ask the court to add those documents to the record. The court will not grant a wholesale supplement of those documents to the record. But to the extent the court cites to evidence *within* those documents that was not cited in the parties' briefing, the court officially adds that evidence to the record. Accordingly, the two motions are granted in part and denied in part.

6. The mile marker is near the boundary of the Reservation.

Reservation's boundaries.[7] At times, the two cars reached speeds of approximately 125 miles an hour. At an area called "Four Corners," Mr. Kurip ran the car off the road. When Trooper Swenson tried to use his patrol car to block Mr. Kurip's car, Mr. Kurip accelerated, struck the patrol car, and drove away. Trooper Swenson was able to see inside the car and described the occupants to dispatch as "two tribal males."[8] He continued his pursuit. Upon learning of the chase, other officers began heading to Trooper Swenson's location to provide backup assistance.

Detective Vance Norton, who was off-duty and driving in his own car, saw the two cars speed by. He says he saw the two men in the car and thought they were Hispanic. He called dispatch on his cell phone to ask what was happening, and the dispatch officer told him that it was a high speed chase but that other officers were not yet in the area. Detective Norton told dispatch that he would follow the chase until another officer arrived. He did not have a police radio in his car so he could not listen to regular dispatch reports. Detective Norton did not hear Trooper Swenson say the two men in the car were "tribal males."

About the same time, Lieutenant Jeff Chugg, supervisor of the Utah Highway Patrol troopers, was at home when he received a call that one of his officers was involved in a highspeed chase. He began to monitor radio

7. The boundaries of the Reservation are often difficult to discern because the Reservation contains checkerboard plots of land that intermingle with state land.

8. Swenson Dep. 104.

traffic and was on the phone with dispatch during the car chase. Soon after he began monitoring the pursuit, he saw on a CAD [9] screen the words "Trooper Swenson had advise[d] that it was a car with two tribal males and Nevada plates."[10] At some point, he got into his car and drove to what had by then become a crash scene.

Trooper Rex Olsen was on duty at the time of the car chase. He was in his patrol car when he heard over the radio about the high-speed chase. He drove toward Trooper Swenson's location to provide backup.

Deputy Troy Slaugh, from the Uintah County Sheriff's Department, also learned that the high speed chase was happening. He called his colleague, Deputy Bevan Watkins (who was a "K-9" officer [11] at the time) to let him know that Uintah County officers were responding to help Trooper Swenson. Deputy Watkins testified that it "was very common to call out a canine when there was a pursuit taking place because it was common for individuals to bail out of a vehicle that was stopped."[12] Deputy Watkins called the dispatch operator to offer his assistance. He received "consent" to go to the scene with his dog.[13] He then began driving in the direction of the high speed chase.

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9. CAD stands for "Computer-Aided Dispatch."

10. (Lt. Jeff Chugg Incident Report, Ex. 1 to Chugg Dep. (Docket No. 278-18) at 1.)

11. A K-9 officer is an officer who uses a trained police dog to do such things as track fugitives and detect the scent of drugs.

12. Watkins Dep. 77.

13. *Id.* at 77.

About the same time, Utah Division of Wildlife Resources (DWR) Investigator Sean Davis was on patrol in a nearby area when he learned of the chase over the radio. He drove toward Trooper Swenson's location.

Similarly, Trooper Young and Deputy Byron drove to the scene when they heard about the high speed chase. Both Trooper Young and Deputy Byron testified that they did not hear any reference to "tribal males."

B. THE FOOT CHASE

The car chase ended when Mr. Kurip lost control of the car and came to a stop on Turkey Track Road, which is located on the Reservation. Both Mr. Kurip and Mr. Murray got out of the car and ran. Trooper Swenson arrived almost immediately after the Kurip car stopped and Mr. Kurip and Mr. Murray got out of the car. As they began running, Trooper Swenson got out of his car, pointed his gun at Mr. Kurip and Mr. Murray, and ordered them to get down on the ground. The men did not stop and continued running in different directions.[14] Trooper Swenson did not see any weapons in the men's hands or in their waistbands. Trooper Swenson took the keys from the Kurip car, returned to his own car, and then followed Mr. Kurip because Mr. Kurip was the driver of the vehicle. After a short drive, Trooper Swenson again got out of his car and began chasing Mr. Kurip on foot. He quickly caught and arrested Mr. Kurip.

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14. A video camera mounted on the dashboard of Trooper Swenson's car captured this scene. (*See* Trooper Swenson Dash Cam Video Excerpts, Ex. H to State Defs.' Mem. Opp'n (Docket No. 311).)

Appendix B

Detective Norton was the first officer (after Trooper Swenson) to arrive at the scene. He saw Trooper Swenson standing on a hill with a man in handcuffs (Mr. Kurip) and asked Trooper Swenson about the other man (Mr. Murray). (The court notes that none of the law enforcement officers on the scene knew Mr. Murray or Mr. Kurip.) Trooper Swenson told Detective Norton that the man had run away and pointed in the direction where Mr. Murray had fled. Detective Norton began his pursuit, first in his car and then on foot. Soon after, Deputy Byron and Trooper Young arrived at the crash scene in their separate cars. As Trooper Swenson had done with Detective Norton, he asked the two officers to capture the fleeing passenger.[15] The three officers, all of whom were armed, pursued Mr. Murray, first in their own patrol cars and then on foot. Trooper Swenson stayed at the crash scene with Mr. Kurip.

Detective Norton, after driving a short distance, got out of his car when he saw Trooper Young and Deputy Byron.

Trooper Young and Deputy Byron saw Detective Norton standing on the top of a nearby hill. The three men spoke and decided that they would take different routes to locate Mr. Murray.

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15. Trooper Swenson does not dispute for purposes of summary judgment that he asked the officers to go after Mr. Murray. Deputy Byron presents evidence that he does not remember talking to Trooper Swenson at the scene (*see* Defs. Byron, Norton, Slaugh, Uintah County, Vernal City, and Watkins' Mem. Opp'n (Docket No. 305) at 15), but the variation in each party's version of this fact is not material to the court's analysis.

As Detective Norton was crossing over a hill, he saw Mr. Murray "coming around another hill."[16] Detective Norton believed that Mr. Murray had something, possibly a gun, in his hand. Mr. Murray ran towards Detective Norton. Detective Norton shouted at Mr. Murray, "Police, get on the ground."[17] Mr. Murray did not obey the command. When Mr. Murray was approximately 140 yards from Detective Norton, he fired at Detective Norton.[18] Detective Norton saw the bullet hit the ground in front him and fired twice at Mr. Murray. Detective Norton testified that he "actually saw my rounds actually hit this dirt or this rock on each side of him -."[19]

After firing the two shots, Detective Norton turned around and, still watching over his shoulder, ran back up the hill. When he reached a distance where he believed that Mr. Murray could not shoot him, he took out his cell phone to call dispatch. Detective Norton described what saw:

> Actually, I noticed that he actually put the gun up to his head, and I'm trying to dial with my left hand with my cell phone because I've got my gun in my right hand, and I'm trying to dial

16. Norton Dep. 133.

17. *Id.* at 137.

18. Detective Norton did not hear a second shot being fired by Mr. Murray. But when he inspected the area later, he saw two bullet casings.

19. *Id.* at 141.

> the numbers, and — I've thought about this a lot, and somebody actually asked me, Why didn't you just call 911? I was actually calling dispatch's number, and that's 789-4222, and I was not hitting the numbers right because I was trying to do it left-handed, and so I made like three attempts to call before it actually went through, so . . .
>
> And like I say, he put the gun to his head. And I think I told him — once or twice screamed, you know, Put the gun down, and then he pulled the trigger, and he just went straight down.[20]

In the meantime, before shots were fired, Deputy Byron and Trooper Young began walking through a wash.[21] Deputy Byron did not see Mr. Murray at this time, but he saw Detective Norton standing on the top of a hill approximately 400 or 500 yards away talking on a cell phone.

He then heard a crackling sound but he was not sure that it was the sound of gunfire,[22] although he did hear a report over his radio that shots had been fired. He did not see who fired the shots, but he saw a person (later identified as Mr. Murray) about 200 yards away on a flat rock outcrop below, who was swinging or waving his arms.

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20. Norton Dep. 146.

21. A "wash" is a dry creek bed.

22. Byron Dep. 97, 99.

Then Deputy Byron heard more crackling sounds and saw Mr. Murray go "from walking to going down."[23] He could no longer see Detective Norton. But he saw Mr. Murray "behind some brush and some rocks."[24] He did not know whether Mr. Murray was crouched behind the bushes or was lying on the ground. In his deposition, he described the situation:

> We continue a short distance. I hear — I hear some crackling. I don't see Norton on the top of the hill anymore. And it — at some point, a guy goes — the person goes from walking to going down. And I see this, but his distance is a good 200-plus yards from me. And I'm going off of memory here. And I can — I barely see like T-shirt or something through — behind some bush and some rocks.
>
> So we — we kind of stop. I hear broken radio traffic of shots fired. And it's broken, but I hear it. I try to confirm it. I'm looking. I can — I can see behind some shrubbery, some rocks, I can see that person, and I don't know if he's stooped or what, but I — I watched him fall. And then I don't see Vance [Norton] anymore.[25]

Deputy Byron did not see whether Mr. Murray had anything in his hands.

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23. *Id.* at 97.

24. *Id.*

25. Byron Dep. 97.

In the meantime, Trooper Swenson had taken Mr. Kurip into custody, and Investigator Davis had arrived at the crash scene. At Trooper Swenson's request, Investigator Davis drove his car down a dead-end road but did not see anyone. He drove back to the crash scene after hearing that shots had been fired and then walked to the shooting scene.

During all this time, Lieutenant Chugg had been monitoring the radio and talking with dispatch. When he heard that shots had been fired, he left his home and drove to the crash scene.

C. AFTER THE SHOOTING

Deputy Byron and Trooper Young quickly returned to their cars and drove to the area where they had seen Detective Norton. When they reached Detective Norton, he was talking on his cell phone. Detective Norton told them that Mr. Murray had shot at him, that he had returned fire. He also stated that he had not shot Mr. Murray but that Mr. Murray had shot himself. Detective Norton pointed out where his bullet casings had fallen.

Deputy Byron and Trooper Young went to the place where Mr. Murray was lying on the ground. Trooper Young, who had his gun drawn, followed behind Deputy Byron to provide cover. Deputy Byron saw Mr. Murray lying on the ground, bleeding from the head but still alive (but his breathing was labored). Deputy Byron saw a gun on the ground next to Mr. Murray. He identified himself to Mr. Murray as he approached. He did not know the extent

of Mr. Murray's injuries. He knew that the ambulance was on stand-by (it is police procedure to call an ambulance to stand by during a high-speed chase). Deputy Byron rolled Mr. Murray "onto his side, stomach" so he could put handcuffs on Mr. Murray.[26] At the same time, Trooper Young pointed his gun at Mr. Murray and continued to provide cover to Deputy Byron.

Deputy Byron described their actions:

> Made an approach with cover. Trooper Young was holding cover on me. Again, I didn't know what to expect. I knew that, you know, get down, secure the scene. Obviously seeing that there was an injury, I didn't know where — to what extent the injuries were. I made an approach safely, and I took him into custody, placed him in handcuffs.[27]

Deputy Byron stated the reasons he placed Mr. Murray in handcuffs: "Again, I didn't know the extent of his injuries, and I just wanted to make sure it was a secure scene before we got medical on its way."[28]

In the meantime, other officers were arriving at the shooting scene.

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26. Byron Dep. 121.

27. *Id.* at 127.

28. *Id.* at 129.

Trooper Olsen, while driving to the scene, heard over the radio that shots had been fired. He arrived about twenty minutes later. He did not go to the shooting scene. He stayed at the crash scene, took an inventory of Mr. Kurip's car, prepared a vehicle impound report, and interviewed Trooper Swenson. He did not have contact with Mr. Murray or Detective Norton at any point during the incident.

While Deputy Watkins was on his way, he learned that the car chase was over and the driver had been taken into custody. He never heard Trooper Swenson say that "two tribal males" were in the car being chased. He did know that the BIA had been called and was en route. When Deputy Watkins arrived at the crash scene, Mr. Murray had already been shot and the ambulance had been called. He helped the ambulance get close to Mr. Murray and help the EMTs load Mr. Murray into the ambulance. He then stayed at the shooting scene until an agent with the F.B.I. arrived.

Deputy Slaugh did not arrive at the shooting scene until after Mr. Murray had been shot. He went to stand by Detective Norton, where he found shell casings on the ground. He took photographs of the shell casings and Detective Norton. He and Detective Norton walked over to Mr. Murray's body. He handed Detective Norton the camera, and Detective Norton took close-up photographs of Mr. Murray. Then the two officers walked back to Deputy Slaugh's car, where they "stayed out of the scene."[29] At

29. Slaugh Dep. 50.

some point, Trooper Swenson asked Deputy Slaugh to take Mr. Kurip to a youth detention, and so Deputy Slaugh left the scene. He had no further involvement in the incident.

After Mr. Murray was handcuffed, the EMTs were summoned from the waiting ambulance. By this time, other officers had arrived. Although Mr. Murray was unconscious, breathing laboriously, and bleeding from the head, no officer at the scene tried to assist or give medical aid to Mr. Murray.

About thirty minutes after the shooting, the EMTs arrived at the shooting scene. While tending to Mr. Murray, they retrieved Mr. Murray's identification card identifying him as an enrolled member of the Ute Tribe. It was only at that point that the officers knew that Mr. Murray was an enrolled member of the Ute Tribe.

When Officer Davis arrived at the shooting scene, he saw Mr. Murray, who was already on the ground and handcuffed. He stayed at the scene, but did not assist Mr. Murray. Instead, he stood over some shell casings to make sure they were not disturbed. He also assisted a Uintah County Sheriff with obtaining GPS locations. He had no further involvement with the events that day.

Deputy Watkins ordered Deputy Byron to accompany Mr. Murray to the hospital.

Lieutenant Chugg arrived at the shooting scene after Mr. Murray had been taken to the hospital.

D. THE HOSPITAL

Mr. Murray was taken to a hospital in Vernal, Utah, where he was pronounced dead shortly after his arrival. Deputy Byron, who had accompanied the ambulance to the hospital, was joined there by Officer Ben Murray and BIA Officer Kevin Myore. After Mr. Murray's death, the three men began collecting evidence: taking photographs of Mr. Murray's body, gathering his clothing in bags, and putting bags over Mr. Murray's hands. A member of the hospital staff drew a vial of blood from Mr. Murray's body. One of the officers took Mr. Murray's clothes and the blood. Deputy Byron placed his index finger in both of the wounds in Mr. Murray's head. According to Deputy Byron, he did this to determine the location of the entrance wound and the exit wound.[30]

E. THE MORTUARY

An employee from a nearby mortuary took Mr. Murray's body to the mortuary. Several law enforcement officers—including Rex Ashdown, who was a special agent from the FBI, Gary Jensen, who was Vernal City Chief of Police, and Keith Campbell, who was both a deputy medical examiner for the Utah State Office of the Medical Examiner and a chief deputy for the Uintah County Sheriff's Office—were there.

Chief Jensen twice tried, unsuccessfully, to take blood from Mr. Murray's body. An employee from the mortuary

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30. Byron Dep. 155.

then made incisions in the neck and jugular vein and drew two vials of blood which he gave to Chief Jensen.[31] Mr. Murray's body was not embalmed.

F. THE MEDICAL EXAMINATION

The following day, Mr. Murray's body was taken to the Utah State Office of the Medical Examiner. Although FBI Special Agent Ashdown had requested that a full autopsy be performed, the Deputy Chief Medical Examiner, Dr. Edward Leis, who was to carry out the examination of Mr. Murray's body, decided to do only a physical examination. According to Dr. Leis, he decided after doing a physical examination of Mr. Murray's body and reading the Office of the Medical Examiner (OME) Investigative Report (which said that Mr. Murray had shot himself in the head), that a full autopsy was not necessary.

Dr. Leis determined that the bullet had entered the left side of Mr. Murray's head, to the rear of the left temple and above the left ear. When he described the entrance wound in his autopsy report, Dr. Leis wrote that he found "abundant soot at the inferior margin of the defect [the wound] and some marginal abrasion is also noted at the inferior margin."[32] Because of the soot and the abrasion, Dr. Leis concluded that the gun was "in close proximity to

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31. It appears that no tests were done on either the blood drawn at the hospital or at the morgue.

32. (Report of Examination, Ex. 1 to Leis Dep. (Docket No. 278-13) at 3.)

the skin surface when it was discharged."[33] But Dr. Leis went further. He explained why he believed that the gun was in contact with Mr. Murray's head when it was fired:

> At the perimeter, there are several triangular shaped tears of the wound. That's a result of the gun being pressed up against the skin surface when it's discharged and gases causing the scalp to be separated from the underlying skull.
>
> When the scalp lifts up, it stretches and it tears and gets its characteristic stellae appearance.[34]

The smaller wound on the right side of Mr. Murray's head was, in Dr. Leis' opinion, the exit wound. Dr. Leis took a urine sample, an eye-fluid sample, and three blood samples from Mr. Murray's body. He sent the samples to a toxicology laboratory for testing.

Dr. Leis completed a death certificate that listed the cause of Mr. Murray's death as suicide resulting from a gunshot wound to the head.[35] Several weeks later, Dr. Leis received the results of the toxicology tests done on the fluids taken from Mr. Murray's body. The tests showed the presence of ethanol, cannabinoids, amphetamine and methamphetamine. Dr. Leis issued an amended death

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33. Leis Dep. 61.

34. *Id.* at 62.

35. As discussed below, the Plaintiffs' theory that Detective Norton shot Mr. Murray at point-blank range in an "execution-style" killing is simply not supported by the evidence.

certificate which added "Acute alcohol intoxication; recent methamphetamine use" as contributing to Mr. Murray's death.[36]

After the examination at the Medical Examiner's Office was completed, Mr. Murray's body was released to his family for burial.

III. ANALYSIS

A. Standard of Summary Judgment Review

Under Rule 56 of the Federal Rules of Civil Procedure, a party is entitled to summary judgment if it demonstrates, through pleadings, depositions, answers to interrogatories, admissions on file, or affidavits, that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), (c). A genuine issue of material fact exists when, after viewing the record and making all reasonable inferences in a light most favorable to the non-moving party, a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The opposing party's response must set forth specific facts showing a genuine issue for trial, and it "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.

36. (Cert. of Death, Ex. 34 to Leis Dep. (Docket No. 272-10) at 2.)

Ct. 1348, 89 L. Ed. 2d 538 (1986). "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient." *Anderson*, 477 U.S. at 252. The court must view the facts in a light most favorable to the Plaintiffs. *See Lundstrom v. Romero*, 616 F.3d 1108, 1118 (10th Cir. 2010); *Buck v. City of Albuquerque*, 549 F.3d 1269, 1279 (10th Cir. 2008).

B. Non-Conspiracy Claims Against the Individual Officers

Under 42 U.S.C. § 1983, the Plaintiffs allege that the officers violated Mr. Murray›s Fourth Amendment and due process rights to be free from illegal seizure, excessive force, and the officers› failure to intervene in ongoing violations of those civil rights. Under 42 U.S.C. § 1985, they allege that the Defendants conspired to obstruct justice in a state court proceeding and to violate equal protection rights, all while motivated by a racial animus directed at Native Americans.

1. Qualified Immunity

Law enforcement officers who have been sued in their individual capacity for constitutional violations are entitled to qualified immunity "when they could not reasonably have known that their challenged actions violated the law." *Ross v. Neff*, 905 F.2d 1349, 1354 (10th Cir. 1990). Qualified immunity "provides 'immunity from suit rather than a mere defense to liability.'" *Mecham v. Frazier*, 500 F.3d 1200, 1203 (10th Cir. 2007) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)).

The doctrine shields law enforcement officers from civil liability for discretionary actions if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982);[37] *see also Powell v. Mikulecky*, 891 F.2d 1454, 1457 (10th Cir. 1989) (same); *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988) (same). Only after the plaintiffs satisfy their burden do the officers "assume the normal burden of a movant for summary judgment of establishing that no material facts remain in dispute that would defeat . . . his claim of qualified immunity." *Powell*, 891 F.2d at 1457.

2. Law Enforcement Jurisdiction

Law enforcement jurisdiction on the Reservation is an important element of the Plaintiffs' case. Apart from some limited exceptions discussed below, neither the State of Utah nor its political subdivisions have criminal jurisdiction in "Indian country," such as the Reservation. *See* 18 U.S.C. § 1152 (federal law of the United States "as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to Indian country."); *Gardner v. United States*, No. 93-4102, 1994 U.S. App. LEXIS 10090 at *10 (10th Cir. May 5, 1994). Although a cooperative law enforcement agreement between a state and a tribe may allow cross-deputized officers from Utah to exercise law

37. The court may choose the order in which to analyze the "clearly established" and "constitutional violation" issues. *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

enforcement authority on the Reservation, none of the officers involved in this incident were cross-deputized.

Any seizure of Mr. Murray by any of the Individual Defendants, absent exigent circumstances, would as a matter of law be unconstitutional. *See Ross v. Neff*, 905 F.2d 1349, 1354 (10th Cir. 1990) (a "warrantless arrest executed outside of the arresting officer's jurisdiction [that is, on tribal land] is analogous to a warrantless arrest without probable cause" and is "presumptively unreasonable."). The court has already held that no exigent circumstances existed in this case.[38] Accordingly, based on *Ross*, any seizure of Mr. Murray on the Reservation by the officers was unreasonable as a matter of law.[39]

3. Claims of Illegal Seizure

The Plaintiffs contend that officers Norton, Young, Byron, and Swenson seized Mr. Murray on the Reservation [40] and so a violation of Mr. Murray's Fourth Amendment rights necessarily occurred. They focus on the following events: (1) Trooper Swenson's order to Mr. Kurip and Mr. Murray to stop after the car chase ended and the men got out of the car; (2) the forming of a police perimeter

38. (*See* July 26, 2010 Mem. Decision & Order (Docket No. 73) at 6 (holding that Detective Norton did not have jurisdiction to seize Mr. Murray on the Reservation because the officers were not in hot pursuit of Mr. Murray).)

39. Plaintiffs also maintain that the officers had no probable cause to seize Mr. Murray. Given the court's jurisdiction ruling, the court need not address the issue of probable cause.

40. There is no genuine dispute that the crash, foot pursuit, and shooting occurred on the Reservation.

to entrap Mr. Murray;[41] (3) Detective Norton firing at Mr. Murray twice; (4) when Detective Norton's bullet allegedly entered Mr. Murray's head; and (5) Deputy Byron handcuffing Mr. Murray while Trooper Young pointed his gun as cover for Deputy Byron.

"Only when the officer, by means of *physical force or show of authority*, has in some way restrained the liberty of a citizen may we conclude that a '*seizure*' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (emphasis added), *quoted in Reeves v. Churchich*, 484 F.3d 1244, 1251 (10th Cir. 2007). Plaintiffs allege that Mr. Murray was illegally seized either through a "show of authority"[42] or physical force multiple times during the pursuit. As discussed below, the case law and facts do not support the Plaintiffs' allegations.

a. Trooper Swenson's Verbal Command to Stop

Plaintiffs assert that Trooper Swenson seized Mr. Murray when he ordered the two men to stop after Mr. Kurip ran the car off the road. Even though the two men were not physically restrained at that point, the Plaintiffs argue that the two men were seized by a show of authority when, after Trooper Swenson shouted to them to stop, Mr. Kurip and Mr. Murray hesitated before running away. Characterizing the incident as a "traffic

41. A police perimeter is a tactic used by law enforcement to surround a suspect and prevent the suspect from leaving the area.

42. A "show of authority" occurs when the plaintiff is not physically touched. *Reeves*, 484 F.3d at 1252.

stop,"[43] they argue that the hesitation was a submission to Trooper Swenson's command and, consequently, a seizure occurred.

In *California v. Hodari D.*, the United States Supreme Court defined the contours of the "show of authority" requirement. 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991), *cited in Reeves*, 484 F.3d at 1252. In *Hodari D.*, the Court held that a police officer's command to halt is not a seizure until the person actually submits to the command. *Id.* at 626. There, the Court held that because the suspect fled and refused to comply with the police command to stop, he was not seized at that point. *Id.* at 629. A number of cases in the Tenth Circuit address the same issue and reach the same conclusion. *See, e.g., Brooks v. Gaenzle*, 614 F.3d 1213, 1219 (10th Cir. 2010) (noting that "one can reasonably conclude a 'seizure' requires restraint of one's freedom of movement and includes apprehension or capture by deadly force."); *Reeves v. Churchich*, 484 F.3d 1244, 1251-53 (10th Cir. 2007) (holding that plaintiffs were not seized when gun was pointed at them because they pushed the gun away and ignored the officers' commands); *United States v. Harris*, 313 F.3d 1228, 1234-35 (10th Cir. 2002) (holding that plaintiff was not seized because he ignored the officer's request to produce identification and continued walking even when the officer followed him); *Bella v. Chamberlain*, 24 F.3d 1251, 1256 (10th Cir. 1994) (holding that officer's firing of gun shots that struck fleeing helicopter was an assertion of authority but that no seizure occurred because the shots did not cause the suspect to submit and or otherwise succeed in stopping the suspect).

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43. (Pls.' Mot. Partial Summ. J. (Docket No. 273) at 16.)

Appendix B

The video taken by the dashboard camera on Trooper Swenson's patrol car captured the scene of the car stopping and Mr. Murray getting out of the car and running away from the officer. Plaintiffs suggest that Mr. Murray, upon getting out of the car, hesitated and glanced to the left toward Mr. Kurip as Trooper Swenson ordered them to stop. This hesitation, Plaintiffs assert, was a brief submission to Trooper Swenson's authority and constituted a seizure of, admittedly, "short duration."[44] But the video does not support the Plaintiffs' characterization of the events.[45] They describe the incident through a play-by-play recitation of what Trooper Swenson remembered and articulated in his deposition.[46] But the events happened much faster than Plaintiffs suggest. That is clear from the dash-cam video taken from Trooper Swenson's car. Having reviewed the video, the court finds that Mr. Murray's glance to the left as he fled on foot, to the extent it was a "hesitation," was so slight that no reasonable jury could interpret it as a submission to Trooper Swenson's commands.[47]

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44. (Pls.' Mot. Partial Summ. J. (Docket No. 273) at 16.)

45. (*See* Trooper Swenson Dash Cam Video Excerpts, Ex. H to State Defs.' Mem. Opp'n (Docket No. 311) at 11:20:31.)

46. (*See* Pls.' Mot. Partial Summ. J. (Docket No. 273) at pp. 5-6, ¶¶ 8-12.)

47. Anything depicted on a videotape of the incident that contradicts and makes unbelievable the plaintiff's characterization of the incident overrides conflicting testimony. *See Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (noting that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by [a videotape in] the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment").

With no submission, Plaintiffs cannot establish that Mr. Murray was seized by Trooper Swenson. Accordingly, Trooper Swenson is entitled to qualified immunity as a matter of fact on Plaintiffs' claim of illegal seizure.

b. Police Perimeter[48]

Plaintiffs next allege that Trooper Swenson, Detective Norton, Deputy Byron, and Trooper Young acted in concert to "erect[] a police perimeter to entrap Murray"

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48. The Plaintiffs, in their seizure analysis, treat the perimeter, shooting, and handcuffing events as one continuous action. But each officer, to the extent liability exists, is only responsible for his own actions. "[A]n allegation that Defendant A violated a plaintiff's clearly established rights does nothing to overcome Defendant B's assertion of qualified immunity, absent some allegation that Defendant B was responsible for Defendant A's conduct." *Dodds v. Richardson*, 614 F.3d 1185, 1194 (10th Cir. 2010); *see also Pahls v. Thomas*, 718 F.3d 1210, 1233 (10th Cir. 2013) ("Liability under § 1983 and *Bivens*, and defendants' entitlement to qualified immunity, turn on an individual assessment of each defendant's conduct and culpability."); *Foote v. Spiegel*, 118 F.3d 1416, 1423-24 (10th Cir. 1997) ("Individual liability under § 1983 must be based on personal involvement in the alleged constitutional violation."); *Auvaa v. City of Taylorsville*, 506 F. Supp. 2d 903, 910 (D. Utah 2007) ("A § 1983 plaintiff must show an affirmative link between a defendant's conduct and a constitutional violation[.]"). Accordingly, the court analyzes the police perimeter allegation separately because not every officer who formed the alleged perimeter shot at Mr. Murray or was involved in the handcuffing of Mr. Murray. *See Bella v. Chamberlain*, 24 F.3d 1251, 1256 (10th Cir. 1994) ("We do not look to events that occurred approximately one hour *prior* to Mr. Bella's actual seizure to determine if the seizure was reasonable. 'A seizure is a single act, and not a continuous fact.'") (emphasis in original) (quoting *California v. Hodari D.*, 499 U.S. 621, 625, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991)).

when they "fanned out on foot," "began searching for Murray with guns drawn, including three handguns, an AR-15 rifle, and a shotgun," and "clos[ed] in on him."[49] But, the Individual Defendants contend, no police perimeter was formed, and even if one was formed, it was not a seizure. The court agrees.

After Mr. Murray fled, Trooper Swenson captured Mr. Kurip, handcuffed him, and brought him back to the police car at the crash scene.[50] As Detective Norton, Deputy Byron and Trooper Young each arrived at the crash scene, Trooper Swenson asked them to apprehend Mr. Murray. The three officers, all of whom were armed, pursued Mr. Murray on foot.

But Trooper Swenson never left the scene of the crash. He stayed with Mr. Kurip. His only role in the foot chase was to ask officers from different law enforcement jurisdictions to chase and capture Mr. Murray. Trooper Swenson had no involvement in formation of the alleged perimeter. And even if one characterizes his request to the officers to pursue Mr. Murray as a command to form a perimeter,[51] he still has no liability because, as discussed

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49. (Pls.' Mot. Partial Summ. J. (Docket No. 273) at 19.)

50. Only at that time did Trooper Swenson determine that Mr. Kurip was not a tribal member. The seizure of Mr. Kurip was jurisdictionally valid. That fact was confirmed *after* the arrest, when Trooper Swenson had the opportunity to make that determination.

51. An officer whose order sets in motion a series of events that violate the suspect's rights may be liable under § 1983. This "indirect participation" liability has been recognized by the Tenth Circuit.

below, the formation of any such perimeter did not seize Mr. Murray.

Indeed, the court is not convinced from the record that a reasonable jury could conclude that the three officers actually formed a perimeter that surrounded Mr. Murray and prevented his escape. The officers were one to two hundred yards away from Mr. Murray and did not have him surrounded. They were coming at him from the same direction, and, with the exception of Detective Norton, the officers did not definitively locate Mr. Murray until after the shooting. Deputy Byron's view of Mr. Murray was partially obscured by a bush and his sighting of Mr. Murray occurred within seconds of Mr. Murray being shot. Trooper Young did not see Mr. Murray until after Mr. Murray had been shot.

But even if they did form a perimeter, the record is not clear that Mr. Murray would have been aware of a police perimeter or would have had the knowledge that a group of police officers were pursuing him. As a group, they did not identify themselves to him. The only officer clearly visible to Mr. Murray was Detective Norton, and the presence of one officer does not form a perimeter.[52]

See, e.g., Buck v. City of Albuquerque, 549 F.3d 1269, 1279-80 (10th Cir. 2008) ("The requisite causal connection [for indirect liability] is satisfied if the [officer] set in motion a series of events that the [officer] knew or reasonably should have known would cause others to deprive the plaintiff of his constitutional rights.").

52. If a suspect is not aware of the presence of the officers, there would be no show of authority to which he could submit. *See Estate of Bennett v. Wainwright*, 548 F.3d 155, 171 (1st Cir. 2008) (holding

But even assuming the officers formed a police perimeter around Mr. Murray, they did not seize him, because Mr. Murray failed to submit to their law enforcement authority. Instead of submitting, Mr. Murray fired a shot at Detective Norton and then turned the gun on himself. *See Reeves v. Churchich*, 484 F.3d 1244, 1252-53 (10th Cir. 2007) (no seizure occurred when police officers gave verbal commands and pointed their weapons at the plaintiffs outside a surrounded apartment building, because one plaintiff ran away and the other pushed the gun away, refusing to follow the officer's command to go inside her apartment); *Estate of Bennett v. Wainwright*, 548 F.3d 155, 171 (1st Cir. 2008) (holding that existence of police perimeter was not a seizure because there was no evidence that the suspect knew his house had been cordoned off, much less that he submitted to the officers' authority).

Because no reasonable jury could find that Mr. Murray submitted to a police perimeter, the court holds that no constitutional violation occurred. Trooper Swenson, Detective Norton, Deputy Byron, and Trooper Young are entitled to qualified immunity from suit on that portion of Plaintiffs' claim.

c. Detective Norton's Shooting at Mr. Murray

The Plaintiffs contend that Detective Norton seized Mr. Murray when he (1) fired shots at Mr. Murray; and

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that existence of police perimeter was not a seizure because there was no evidence that the suspect knew his house had been cordoned off, much less that he submitted to the officers' authority). We will never know what Mr. Murray knew at the time he died.

(2) according to Plaintiffs, shot Mr. Murray in the head. The record does not support their claim and no reasonable jury could find against Detective Norton.

During the foot chase, when Detective Norton spotted Mr. Murray approximately 100 yards away, he held his gun (a .40 caliber weapon) in a "low ready position,"[53] identified himself as a police officer, and ordered Mr. Murray to get down on the ground. In response, Mr. Murray fired two shots at Detective Norton, both of which hit the ground by Detective Norton. In return, Detective Norton fired two shots at Mr. Murray as he tried to distance himself from Mr. Murray by retreating back up the hill. Those shots also fell short of the target. Then Detective Norton saw Mr. Murray put a gun to his head, shoot himself, and drop to the ground. The gun found on the ground by Mr. Murray was a .380 handgun.

Shots Fired

As noted above, a seizure occurs when the individual is physically restrained by the officer or when the individual submits to the officer's show of authority. *Reeves v. Churchich*, 484 F.3d 1244, 1251 (10th Cir. 2007). Neither scenario occurred here. When Detective Norton identified himself as a police officer and told Mr. Murray to get to the

53. Holding a gun in the "low ready position" means holding the gun with both hands, arms straight, in a position below the target level. According to Detective Norton, when he saw Mr. Murray, he was not pointing his gun at Mr. Murray, but rather held his gun in a "low ready [position] to where it's down to where you actually can observe what's going on so your gun's not in your way." (Norton Dep. 142.)

ground, Murray resisted by firing two shots at Detective Norton. When Detective Norton responded by shooting back at Mr. Murray, his bullets hit the ground around Mr. Murray. Because Mr. Murray resisted Detective Norton's order and because Detective Norton's bullets missed the target (Mr. Murray), Detective Norton did not seize Mr. Murray at that point. *See, e.g.*, *James v. Chavez*, 830 F. Supp. 2d 1208, 1242-43 (D.N.M. 2011) (holding that a shot that misses the intended target is not a seizure) (citing to *Reeves*, 484 F.3d at 1252-53).

Plaintiffs contend Mr. Murray was waving his arms in an act of surrender and so he did submit to Norton's show of authority. But the evidence on that point is inconclusive, and, more importantly, not material. The evidence clearly shows that Mr. Murray shot himself.

The Bullet to Mr. Murray's Head

The Plaintiffs argue that Detective Norton seized Mr. Murray because he shot Mr. Murray in the head. But the Plaintiffs' evidence is sparse, circumstantial, subject to more than one interpretation, and, at times, very speculative. Moreover, evidence to the contrary is strong and is consistent with a self-inflicted gunshot wound.

Deputy Byron testified that he did not see Detective Norton next to Mr. Murray when Mr. Murray dropped to the ground. Detective Norton testified that he was up on a hill when he saw Mr. Murray shoot himself.[54]

54. As discussed below, contrary to Plaintiffs' allegations, there are no inconsistencies between Deputy Byron's version of events and Detective Norton's version.

Appendix B

The Deputy Chief Medical Examiner Dr. Edward Leis, who conducted the physical examination of Mr. Murray's body, concluded in his report that the wound was caused by a gun shot "in close proximity to the skin surface when it was discharged."[55] He based his conclusion on "abundant soot at the inferior margin of the defect [the wound] and some marginal abrasion is also noted at the inferior margin."[56] In his testimony, he elaborated on his conclusion that the gun was in contact with Mr. Murray's head when it was fired:

> At the perimeter, there are several triangular shaped tears of the wound. That's a result of the gun being pressed up against the skin surface when it's discharged and gases causing the scalp to be separated from the underlying skull.
>
> When the scalp lifts up, it stretches and it tears and gets its characteristic stellae appearance.[57]

The smaller wound on the right side of Mr. Murray's head was, in Dr. Leis' opinion, the exit wound.[58] After

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55. Leis Dep. 61.

56. (Report of Examination, Ex. 1 to Leis Dep. (Docket No. 278-13) at 3.)

57. Leis Dep. 62.

58. Plaintiffs note that Mr. Murray was right-handed, which, they say, is inconsistent with a finding that the entrance wound was on the left side of the head. But Dr. Leis testified that the location of the entrance wound, the trajectory of the bullet, and the location of the exit wound would be consistent with Mr. Murray putting the gun

Dr. Leis certified that Mr. Murray's death was a suicide resulting from a gunshot wound to the head, he added an additional cause of death (based on results from testing of Mr. Murray's bodily fluids). Because the tests showed the presence of drugs and alcohol in Mr. Murray's system, Dr. Leis issued an amended death certificate which added "Acute alcohol intoxication; recent methamphetamine use" as contributing to Mr. Murray's death.[59]

Detective Norton was more than 100 yards away when Mr. Murray was shot. Dr. Leis testified that there was no evidence that the wound could have been caused by a shot coming from that far away.[60] Plaintiffs maintain that Detective Norton was not 100 yards away, but was right next to Mr. Murray and so he had the capability of inflicting the contact wound. But the actual evidence in the record (that is, testimony by Detective Norton and Deputy Byron) shows that Detective Norton was not right next to Mr. Murray when the fatal shot was fired.

The Plaintiffs' alternative contention that Mr. Murray shot himself in response to the pressure of a wrongful pursuit is not persuasive. Their theory is speculative. Moreover, such a situation would not be a seizure. *See Brower v. County of Inyo*, 489 U.S. 593, 596-97, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989) ("[A] Fourth

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in his right hand to the left side of his head and pulling the trigger. (Leis Dep. 129-30 (quoting from his Report that "[t]he projectile path is left to right, upward, and slightly front to back.").)

59. (Cert. of Death, Ex. 34 to Leis Dep. (Docket No. 272-10) at 2.)

60. Leis Dep. 124.

Amendment seizure does not occur whenever there is . . . a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but *only when there is governmental termination of freedom* of movement *through means intentionally applied.*") (italics emphasis in original; underline emphasis added). Based on the evidence in the record, no reasonable jury could find that Detective Norton inflicted the mortal blow to Mr. Murray.

Plaintiffs contend that Detective Norton shot Mr. Murray in the head at point blank range, but they offer speculation rather than evidence to support their claim. For instance, they point to Dr. Leis' response (in his deposition) to a question that asked for an answer to a hypothetical. Specifically, the attorney asked, "So would it be possible — is it your opinion, Doctor, that this could be — looking at this wound [as depicted in a photograph], that it could be self-inflicted or an execution-style shooting?"[61] After an objection, the attorney then asked, "Can you tell from this entrance wound, Dr. Leis, whether or not this was conclusively caused by a self-inflicted gunshot wound or an execution-style killing?"[62] Dr. Leis said, "No."[63] But Dr. Leis was asked by Plaintiffs' counsel whether he could conclusively say, based solely on examining the entrance wound with no other evidence to provide context, that the wound was caused by a self-inflicted gun shot wound

61. Leis Dep. 64.

62. *Id.* at 64-65.

63. *Id.* at 65.

rather than an execution-style killing. Furthermore, Dr. Leis' answer based on the hypothetical offered to him is not supported by the facts in the record. Indeed, Dr. Leis, based on his examination of Mr. Murray and the data he gathered from tests of body fluids, opined that Mr. Murray had shot himself in the head. All of the direct evidence presented by the Defendants, including Dr. Leis' testimony and report, supports the conclusion that Mr. Murray shot himself. Plaintiffs offer no more than speculation and no reasonable jury could find that Detective Norton shot Mr. Murray in the head at point-blank range.

The Plaintiffs question Detective Norton's version of the events that occurred. But veracity of a witness is not to be considered at the summary judgment stage. Moreover, independent evidence discussed above supports Detective Norton's version of events. It is much more reasonable to infer that Mr. Murray's acute intoxication rendered him irrational and that he pulled the trigger. Under all of the circumstances, no reasonable jury could accept the Plaintiffs' theory about an execution-style killing.

Because direct evidence (unrefuted by admissible evidence) that Mr. Murray's gunshot wound was self-inflicted, it could not be a physical restraint imposed by Detective Norton. Consequently, the fatal shot was not a seizure by a law enforcement officer.

For foregoing reasons, no reasonable jury could conclude that a seizure of Mr. Murray occurred during the shooting incident, and so his constitutional right to be free

from illegal seizures was not violated. Detective Norton is entitled to qualified immunity on the seizure claim.

d. Handcuffing of Mr. Murray at the Shooting Scene

Deputy Byron

Deputy Byron's handcuffing of Mr. Murray was indisputably a seizure. Because that seizure occurred on the Reservation, where Mr. Murray was an enrolled member of the Ute Tribe, and because Deputy Byron was not cross-deputized, that seizure was a *per se* violation of Mr. Murray's Fourth Amendment right, albeit a technical violation. *See Ross v. Neff*, 905 F.2d 1349, 1353-54 (10th Cir. 1990) (holding that a warrantless arrest made outside of the officer's jurisdiction is a constitutional violation absent exigent circumstances).

Consequently, the court must determine whether Deputy Byron violated a clearly established constitutional right of which a reasonable officer would have known. In other words, to determine whether the officers are entitled to the qualified immunity defense, the court "must determine whether a reasonable officer could have believed the manner of plaintiff's arrest and detention . . . to be constitutionally permissible, in light of clearly established law *and the information defendants possessed at the time*." *Martin v. Bd. of County Comm'rs*, 909 F.2d 402, 405 (10th Cir. 1990) (emphasis added).

Even if the rule of law regarding an officer's jurisdiction was clearly established in *Ross*, that decision did not address how or when a police officer must determine the tribal status of the suspect. Deputy Byron did not know Mr. Murray and he did not hear any reference to "tribal males" over the radio. When Deputy Byron handcuffed Mr. Murray, at that point there was no way he could determine whether Mr. Murray was a tribal member. He followed reasonable police procedure, and there is no legal rule prohibiting the procedure he followed.

Moreover, an officer cannot tell whether a person is a registered tribal member just by looking at him.[64] The officer needs official verification, which may or may not be in possession of the suspect. "It is the policy and practice of the State Defendants and the law enforcement agencies working near the reservation to stop individuals suspected of wrongdoing, and *then* determine whether the suspect is a registered member of a tribe."[65]

Deputy Byron confirmed this practice when he testified that his employer's policy was to handle situations requiring a quick response without regard to jurisdiction because the officers must provide assistance to whomever needs it without having to verify first whether the suspect was a member of the Ute Tribe.

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64. The court notes that Mr. Kurip was originally identified as a "tribal male" even though he was not.

65. (State Defs.' Mem. Opp'n (Docket No. 310) at 22 (citing Swenson Dep. at 28; Chugg Dep. at 27-31, 161; Byron Dep. at 25-26) (emphasis in original).)

Deputy Byron reasonably believed that he had a factual basis to restrain Mr. Murray. It is not reasonable to expect him to ascertain Mr. Murray's status before then.

Trooper Young

Plaintiffs also contend that Trooper Young violated Mr. Murray's civil rights by pointing a gun at him. Trooper Young did not touch Mr. Murray and did not point his gun at Murray for longer than the time it took for Deputy Byron to approach Mr. Murray and handcuff him. Trooper Young did not make a show of authority to Mr. Murray, as Mr. Murray was unconscious and had no knowledge of the cover Trooper Young provided for Deputy Byron. Pointing a gun at a suspect, by itself, with no submission by the suspect, is not a seizure. *See Reeves v. Churchich*, 484 F.3d 1244, 1252-53 (10th Cir. 2007) (finding no seizure when officers pointed weapons and made verbal commands without submission to authority); *James v. Chavez*, 830 F. Supp. 2d 1208, 1243 (D.N.M. 2011) ("[W]ithout evidence that a person has submitted to a show of authority, even an officer pointing a gun directly at a person's head does not constitute a seizure.") (citing *Reeves*, 484 F.3d at 1252-53). To the extent the Plaintiffs contend that Trooper Young's action was a seizure because it was connected to (or perhaps facilitated by) Deputy Byron's action, their claim fails, because, as discussed above, it was reasonable for Trooper Young to protect his fellow officer, whether the danger was real or not. He too had no reasonable basis for knowing that Mr. Murray was an enrolled member of the Tribe. An officer is not required to determine a person's legal status before doing his duty to enforce the

law in a situation requiring a quick response. For the foregoing reasons, the court finds that Trooper Young did not violate Mr. Murray's civil rights by pointing a gun at Mr. Murray and so he is entitled to qualified immunity on the seizure claim.

4. Claims of Excessive Force

The Plaintiffs contend that the officers used excessive force against Mr. Murray when they (1) formed the "police perimeter to entrap and apprehend Murray at gunpoint";[66] (2) ordered Mr. Murray at gun point to get down on the ground; and (3) used deadly force to apprehend Mr. Murray (that is, when Detective Norton shot at Mr. Murray and then allegedly shot Mr. Murray in the head). Additionally, although it is not clearly laid out in the pleadings, it appears that the Plaintiffs also contend that Deputy Byron used excessive force when he handcuffed Mr. Murray.

The Plaintiffs bring their excessive force claim under the Fourth Amendment as well as the substantive due process clause of the Fourteenth Amendment. A claim of excessive force occurring during a seizure must be analyzed under the Fourth Amendment reasonableness test set forth in *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). *United States v. Lanier*, 520 U.S. 259, 272 n.7, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). A claim of excessive force that occurs outside the course of a seizure is analyzed under the Fourteenth

66. (Pls.' Mot. Partial Summ. J. (Docket No. 273) at 21.)

Amendment's substantive due process principles. *County of Sacramento v. Lewis*, 523 U.S. 833, 843-44, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

Because the Plaintiffs challenge acts that occurred in both seizure and non-seizure circumstances, the court will analyze the claims of excessive force under both standards, as applicable. But, regardless of the standard that applies, no reasonable jury could find that any of the officers used excessive force on Mr. Murray.

a. Excessive Force Claims Under the Fourth Amendment

To find excessive force under the Fourth Amendment, the court must first find that a seizure occurred. *County of Sacramento v. Lewis*, 523 U.S. 833, 843-44, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998); *Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The only time Mr. Murray was seized was when Deputy Byron handcuffed him. Accordingly, that is the only act that must be analyzed under the standards applicable to the Fourth Amendment claim.

To determine whether Deputy Byron used excessive force, the court must consider the totality of the circumstances and conduct "a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (internal citations and quotation marks omitted).

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

Id. at 396-97. "The use of handcuffs is the use of force, and such force must be objectively reasonable under the circumstances." *Muehler v. Mena*, 544 U.S. 93, 103, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005) (Kennedy, J. concurring).

Here, Deputy Byron did not know the identity of Mr. Murray or anything about him other than his involvement in the high-speed chase, his flight from a police officer, subsequent exchange of gun shots, and a gun on the ground next to Mr. Murray. He rushed onto the scene and had little time to assess the situation before he handcuffed Mr. Murray. He knew he had a wounded suspect and that emergency personnel were on the way. He secured the scene, as he was trained to do. Securing the scene, no matter what it might present, is a reasonable response by a police officer.

Moreover, to succeed on a claim of excessive force for the manner of handcuffing, a plaintiff "must show 'some actual injury that is not de minimis, be it physical

or emotional.'" *Koch v. City of Del City*, 660 F.3d 1228, 1247 (10th Cir. 2011) (quoting *Cortez v. McCauley*, 478 F.3d 1108, 1129 (10th Cir. 2007)). There is no evidence of physical harm or emotional harm to Mr. Murray. The manner in which Deputy Byron handcuffed Mr. Murray was simple and the least intrusive way to secure the scene for the EMTs.

b. Excessive Force Claims Under the Substantive Due Process Clause

Plaintiffs alternatively claim that Mr. Murray's substantive due process rights under the Fourteenth Amendment were violated. The due process analysis under the Fourteenth Amendment applies to a claim of excessive force only when no seizure occurred. *See County of Sacramento v. Lewis*, 523 U.S. 833, 842-43, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (holding that all claims of excessive force arising out an arrest, investigatory stop, or other seizure should be analyzed under the Fourth Amendment, and that the substantive due process analysis applies only when the claim is not covered by the Fourth Amendment); *United States v. Lanier*, 520 U.S. 259, 272 n.7, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) ("[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process."); *Becker v. Kroll*, 494 F.3d 904, 922 (10th Cir. 2007) (noting that substantive due process analysis is foreclosed if claim is covered by the Fourth Amendment). Because neither the pursuit of Mr. Murray on Reservation

land nor Detective Norton's shot at Mr. Murray resulted in a seizure, the court analyzes the Plaintiffs' claims on those events by applying the substantive due process standard.

"[T]he substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *County of Sacramento*, 523 U.S. at 847 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 128, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)). And "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Collins*, 503 U.S. at 129. The substantive due process standard is "more onerous" than the Fourth Amendment standard. *Butler v. City of Norman*, 992 F.2d 1053, 1054 (10th Cir. 1993)). Plaintiffs have not met this high threshold.

All of the Plaintiffs' claims of egregious behavior stem from their complaint that the actions took place on the Reservation and were aimed at an enrolled member of the tribe. The officers did not know, could not have known, and did not have the duty at that point to ascertain whether Mr. Murray was an enrolled member of the tribe.

The pursuit was reasonable under the circumstances. Mr. Murray was part of a high speed chase and fled from Trooper Swenson. This information created sufficient concern in the officers' minds about Mr. Murray's motives for the flight and the danger he posed, if any. They reasonably believed he had committed at least one crime (flight from a police officer) and pursuing him for that was reasonable. Even though the BIA police had been

called as a precaution, no BIA police officer was there at the time. It was completely reasonable to apprehend the fleeing suspect so they could fully investigate and turn him over to the proper authorities, if necessary. There is no evidence that the officers were acting like a posse to capture the "Indian," as Plaintiffs have argued. Although Plaintiffs paint it that way, they do so without evidence to support their theory.

It was also reasonable under the circumstances for Detective Norton to fire his gun at Mr. Murray. Mr. Murray shot at Detective Norton first. Detective Norton was retreating to protect himself when he shot back.

None of the officers' actions were egregious or conscience shocking. Their attempt to apprehend Mr. Murray while protecting themselves—and the means they used to do so—were expected police behavior in light of the circumstances.

5. Claims of Failure to Intervene

It is clearly established that every law enforcement officer has the duty to intervene if he sees a person's constitutional rights being violated by a fellow officer and has an opportunity to do so. *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1210 (10th Cir. 2008). "'Omissions as well as actions may violate civil rights'" and "'under certain circumstances a state actor's failure to intervene renders him or her culpable under § 1983.›" *Lanigan v. Village of East Hazel Crest*, 110 F.3d 467, 477 (7th Cir. 1997) (quoting *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994)). An officer is liable under § 1983 for failure to intervene if he knows

a constitutional violation is being committed and he had a "realistic opportunity to intervene to prevent the harm from occurring." *Id.* at 477.

Plaintiffs allege that the Individual Defendants failed in their duty to intervene to protect the constitutional rights of Mr. Murray. Specifically, they allege in their complaint that each of the Individual Defendants failed to intervene because they breached their "duty to protest" the "illegal pursuit and apprehension" of Todd Murray on the Reservation.

> Each [Individual] Defendant had a *duty to protest* to his fellow officers that each of them was *outside their jurisdictional authority and was without any legal authority to pursue Murray* on the tribal trust lands of the Uintah and Ouray Reservation.[67]

The Plaintiffs further allege that:

> each of the [Individual] Defendants had a *duty to protest* to his fellow police officers that there existed *neither reasonable suspicion nor probable cause* to believe that Todd R. Murray had committed any crime, meaning that the officers' pursuit of Murray—at gunpoint—was illegal on multiple Constitutional grounds.[68]

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67. (Pls.' Third Am. Compl. (Docket No. 170) at ¶ 124 (emphasis added).)

68. (Pls.' Third Am. Compl. (Docket No. 170) at ¶ 125 (emphasis added).)

It appears from the Plaintiffs' complaint that they focus the majority of their "failure to intervene" allegations on the pursuit of Mr. Murray. But based on their statements in briefs, the court liberally reads their pleadings and concludes that they also challenge the officers' actions concerning the handcuffing of Mr. Murray. Accordingly, the court will look at the events that occurred at the shooting scene after Mr. Murray was shot.[69]

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69. Plaintiffs argue that Deputy Watkins' order to Deputy Byron to accompany Mr. Murray to the hospital and then to the mortuary set in motion a series of events that violated Mr. Murray's rights-namely, "improperly put[ting] his fingers in the wound on Murray's head while Murray's body was at the hospital." (Pls.' Mem. Opp'n to Watkins' Mot. Summ. J. (Docket No. 327) at 12.) This is not a "failure to intervene" claim. It is a supervisory liability claim. Although a supervisor may not be held vicariously liable for the acts of a subordinate, he may be personally liable if he had personal involvement, the supervisor's act set in motion a series of events that caused the constitutional violation, and that the supervisor had the requisite state of mind. *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 767 (10th Cir. 2013). Plaintiffs apparently claim that Deputy Watkins directly caused Mr. Murray's civil rights to be violated by ordering Deputy Byron to stay with the body at the hospital and mortuary, and so he is directly involved in the alleged act violating the rights. Deputy Watkins was not present at the hospital or mortuary. And there is no evidence that Deputy Watkins ordered Deputy Byron to touch Mr. Murray. Nor do the Plaintiffs cite any case law supporting their contention that what Deputy Byron did violated a civil right. To the extent Deputy Watkins set in motion Deputy Byron's acts at the hospital (that is, placing his finger in the hole in Mr. Murray's head), such an act could not have been anticipated. Moreover, Mr. Murray was dead by then and, consequently, did not have any constitutional rights to be violated. *See Dohaish v. Tooley*, 670 F.2d 934, 936 (10th Cir. 1982) (civil rights are personal and do not survive the person's death). As troublesome as Deputy Byron's

To find liability, the court must find that a duty to intervene exists and that the officer had an opportunity to intervene. But there can be no failure to intervene if a constitutional right has not been violated. *See, e.g., Harper v. Albert*, 400 F.3d 1052, 1064 (7th Cir. 2005) ("In order for there to be a failure to intervene, it logically follows that there must exist an underlying constitutional violation[.]"); *Gossmeyer v. McDonald*, 128 F.3d 481, 494 (7th Cir. 1997) (no constitutional violation and so no liability for failure to intervene), *cited in Ford v. Fleming*, 229 F.3d 1163 [published in full-text format at 2000 U.S. App. LEXIS 23594], 2000 WL 1346392, at *2 (10th Cir. 2000) (unpublished table case). The pursuit of Mr. Murray, both by car and on foot, did not constitute a violation, so the court need not determine whether there was a failure to intervene. *See Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) (stating that "pre-seizure conduct is not subject to Fourth Amendment scrutiny").

As the court found above, the pursuit did not constitute a seizure (it did not result in submission to a show of authority or physical restraint of Mr. Murray). Second, pursuing Mr. Murray on Reservation lands after a high-speed car chase is not a violation of Mr. Murray's rights because he was not seized and there was no reason for the police officers to know that Mr. Murray was an enrolled member of the tribe. *Compare Ross v. Neff*, 905 F.2d 1349, 1354 n.6 (10th Cir. 1990) (addressing an arrest (seizure) of a tribal member on Indian land, not pre-seizure conduct).

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action is, Deputy Watkins is not liable for his own actions or the actions of Deputy Byron.

Third, when Deputy Byron handcuffed Mr. Murray, neither Deputy Byron nor Trooper Young had any basis for knowing that Mr. Murray was an enrolled member of the Tribe. The same would apply to any other officer on the scene, either at the time of the handcuffing or immediately afterward. The handcuffing had already occurred by the time the officers arrived at the site. Accordingly, they did not have the ability to stop the handcuffing. Also, none of the officers had any basis for knowing that Mr. Murray was an enrolled member of the Tribe, and so they would not reasonably have known that a violation of the right recognized in *Ross v. Neff* had occurred.

C. Conspiracy Claims Under 42 U.S.C. § 1985

Plaintiffs bring their ninth and tenth causes of action in civil conspiracy under 42 U.S.C. § 1985(2) and 42 U.S.C. § 1985(3) against the following Individual Defendants: Detective Norton, Deputy Byron, Deputy Watkins, Deputy Slaugh, Trooper Swenson, Trooper Young, Trooper Chugg, Trooper Olsen, and DWR Officer Davis. Plaintiffs also allege civil conspiracy under both sections against Vernal City.[70]

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70. Plaintiffs do not allege a § 1983 conspiracy. A § 1983 conspiracy claim is "a conspiracy to violate a right protected by § 1983; in other words, a conspiracy to deprive a plaintiff of a constitutional or federally protected right under color of state law." *See Dixon v. Lawton*, 898 F.2d 1443, 1449 n.6 (10th Cir. 1990). To recover under a § 1983 conspiracy theory, a plaintiff must plead and prove (1) a conspiracy, and (2) an actual deprivation of rights, but need not prove racial animus. *See id.* at 1449; *see also Landrigan v. City of Warwick*, 628 F.2d 736, 742-43 (1st Cir. 1980).

Summed up, Plaintiffs' argument is that Defendants engaged in "[a] conspiracy to cover up a killing."[71] Plaintiffs' theory is that Detective Norton shot and killed Mr. Murray, and that the rest of the Defendants conspired to cover-up that killing and protect Detective Norton.[72] Plaintiffs argue:

> It is clear from the totality of the circumstances that all the law enforcement officers acted in concert to ensure that Mr. Murray would not survive to tell his version of the events, that any evidence that contradicted [Detective] Norton's version of the events was destroyed . . . . In fact, Defendants went as far as to violate the law to tamper with and destroy evidence.[73]

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71. (Pls.' Mem. Opp'n to Norton's Mot. Summ. J. (Docket No. 321) at 15.)

72. (*See* May 2, 2013 Status Conference Tr. (Docket No. 366) at 100.) "Our theory is that he [Norton] shot him and where and what happened from there, Your Honor, is all part of this conspiracy to cover up the fact that he shot him. . . . [W]e are alleging, Your Honor, that they conspired to cover up Norton killing this young man." (*Id.*) For Plaintiffs, "there is an issue as to whether or not he [Mr. Murray] was murdered." (*Id.* at 106.) As noted above, the evidence does not and could not support a conclusion that Mr. Murray was killed by Detective Norton.

73. (Pls.' Mem. Opp'n to Norton's Mot. Summ. J. (Docket No. 321) at 21); (Pls.' Mem. Opp'n to Byron's Mot. Summ. J. (Docket No. 324) at 19); (Pls.' Mem. Opp'n to Slaugh & Watkins' Mot. Summ. J. (Docket No. 327) at 22); (Pls.' Mem. Opp'n to Swenson's Mot. Summ. J. (Docket No. 322) at 18-19); (Pls.' Mem. Opp'n to Young's Mot. Summ. J. (Docket No. 325) at 20); (Pls.' Mem. Opp'n to Chugg, Davis, & Olsen's Mot. Summ. J. (Docket No. 326) at 18.)

Appendix B

Plaintiffs argue that Defendants' conspiratorial conduct obstructed justice in a state court proceeding in violation of § 1985(2) and deprived Mr. Murray of equal protection under the laws in violation of § 1985(3).

Each of the Individual Defendants, as well as the sole municipal defendant, Vernal City, asks the court to grant their motions for summary judgment on the ninth and tenth causes of action.

Section 1985(2) is separated into two clauses by a semicolon. The first clause addresses conspiracies to obstruct justice in federal courts, and the second clause addresses conspiracies to obstruct justice in state courts. *See Kush v. Rutledge*, 460 U.S. 719, 724-25, 103 S. Ct. 1483, 75 L. Ed. 2d 413 (1983). The Plaintiffs bring their § 1985(2) claim under the second clause, which is commonly referred to as the clause "after the semicolon" or "following the semicolon." *See i.e., Brown v. Chaffee*, 612 F.2d 497, 502 (10th Cir. 1979); *see also Lessman v. McCormick*, 591 F.2d 605, 607 (10th Cir. 1979). To prevail against Defendants' motions for summary judgment, Plaintiffs must show there is evidence of a conspiracy, that obstructs the "due course of justice in any State," and that causes injury. *See* 42 U.S.C. § 1985(2). The conspiracy must have the "intent to deny to any citizen the equal protection of the laws." *Id.*

Section 1985(3) contains four clauses, but Plaintiffs bring their cause of action under only the first one, which also addresses conspiracy to violate equal protection of the laws. To survive Defendants' motions for summary judgment on § 1985(3), Plaintiffs must present evidence to prove a (1) conspiracy; (2) to deprive them of equal

protection; (3) at least one overt act in furtherance of the conspiracy; and (4) an injury or deprivation that results. *See Tilton v. Richardson*, 6 F.3d 683, 686 (10th Cir. 1993) (citing *Griffin v. Breckenridge*, 403 U.S. 88, 103, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971)).

Significantly, in addition to proving a conspiracy and a violation of a civil right, both of these civil conspiracy sections (§ 1985(2) and § 1985(3)) require the Plaintiffs to show that there is race-based discriminatory animus motivating the alleged conspiracy. *See Griffin*, 403 U.S. at 102 (§ 1985(3) requires showing of racial or some other class-based invidious discriminatory intent); *see also Smith v. Yellow Freight Sys., Inc.*, 536 F.2d 1320, 1323 (10th Cir. 1976) ("[A] racial, or perhaps otherwise class-based, invidiously discriminatory animus must be behind the conspirators' action for a cause of action under that portion of § 1985(2) following the semicolon."); *see also Lessman v. McCormick*, 591 F.2d 605, 608 (10th Cir. 1979).

Individual Defendants

1. No Evidence of Racial Animus

In their motions for summary judgment, the Individual Defendants argue that there is no evidence that an invidious, racial-based animus against Mr. Murray motivated the alleged conspiracy. Plaintiffs respond that "[t]he only plausible explanation for the abusive way Defendants handled every aspect of this case is racial bias."[74]

74. (Pls.' Mem. Opp'n to Norton's Mot. Summ. J. (Docket No. 321) at 20-21); (Pls.' Mem. Opp'n to Byron's Mot. Summ. J. (Docket No.

Appendix B

In addition to their global claim that everything that happened in this case proves their claim of racial animus, Plaintiffs offer the following evidence to support a finding of invidious racial animus: (1) Trooper Swenson announced that there were "tribal males" in the vehicle he was pursuing; (2) Detective Norton testified that he thought that Mr. Murray and Mr. Kurip were Hispanic when they first passed him on the road at a high speed; and (3) There was "significant racial tension between Utah State police officers and Native Americans in Utah."[75]

Plaintiffs assert that Trooper Swenson "was quick to announce" that the individuals in the car he was pursuing were "tribal males" for "the express purpose of communicating to all responding officers the unspoken fashion in which to respond to the incident."[76] But Trooper Swenson's "announcement" was hardly a quick one: he

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324) at 17-21); (Pls.' Mem. Opp'n to Slaugh & Watkins' Mot. Summ. J. (Docket No. 327) at 21-24); (Pls.' Mem. Opp'n to Swenson's Mot. Summ. J. (Docket No. 322) at 17-21); (Pls.' Mem. Opp'n to Young's Mot. Summ. J. (Docket No. 325) at 18-22); (Pls.' Mem. Opp'n to Chugg, Davis, & Olsen's Mot. Summ. J. (Docket No. 326) at 17-20.)

75. (*See* Pls.' Mem. Opp'n to Slaugh & Watkins' Mot. Summ. J. (Docket No. 327) at 22); (*see also* Pls.' Mem. Opp'n to Byron's Mot. Summ. J. (Docket No. 324) at 18.)

76. (Pls.' Mem. Opp'n to Norton's Mot. Summ. J. (Docket No. 321) at 20-21); (Pls.' Mem. Opp'n to Byron's Mot. Summ. J. (Docket No. 324) at 18); (Pls.' Mem. Opp'n to Slaugh & Watkins' Mot. Summ. J. (Docket No. 327) at 21-22); (Pls.' Mem. Opp'n to Swenson's Mot. Summ. J. (Docket No. 322) at 18); (Pls.' Mem. Opp'n to Young's Mot. Summ. J. (Docket No. 325) at 19); (Pls.' Mem. Opp'n to Chugg, Davis, & Olsen's Mot. Summ. J. (Docket No. 326) at 18.)

did not identify the possible ethnicity of the driver to central dispatch until more than ten minutes into the high speed chase. And then all Trooper Swenson says is "Male appears to be tribal, driver."[77] The second reference Trooper Swenson makes to central dispatch is twenty-six minutes into the chase and after Mr. Kurip crashes the car he is driving at Turkey Track and both he and Mr. Murray leave the car and run in opposite directions. At that point, Trooper Swenson states: "I've got two runners out, both tribal males."[78]

Trooper Swenson made those statements to dispatch on his radio, and the dispatch agent copied that information on the radio channel. The evidence before the court is clear that Detective Norton was not among those listening to the dispatch radio.[79] Although Trooper Swenson made those statements, the record does not support an inference that all of the other Defendants heard them and acted based upon them, especially because the radio quality was questionable.

Deputy Byron testified that the quality of the radio signal and communication was quite bad: "Handheld radios don't get out in tight areas, especially in that general area. It's—it's broken, broken traffic. You're only maybe catching pieces. Sometimes it's just a radio

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77. (*See* Police Audio Dispatch Tr., Ex. 5 to Defs.' Mem. Opp'n App. (Docket No. 306-5) at 11.)

78. (*See* Police Audio Dispatch Tr., Ex. 5 to Defs.' Mem. Opp'n App. (Docket No. 306-5) at 25-26.)

79. Norton Dep. 109-110.

break."[80] He testified that the connection was worse than only being able to hear every third word.[81]

In addition, the Individual Defendants joined the dispatch channel at different points, and the evidence before the court is that they joined the chase to provide backup support for Trooper Swenson. Regardless of when they joined the dispatch channel, the evidence before the court is that not all of them heard Trooper Swenson's descriptive statements. Officer Davis is the only defendant who testified that he heard a reference to tribal males over the radio, and he was one of the last officers to arrive at the shooting scene.[82] Deputy Watkins and Deputy Byron testified that they did not hear a reference to "tribal males."[83] Troopers Young & Olsen testified that they did not recall hearing that there were "tribal males" over the radio and that the racial identity of the car occupants was not in their minds during the chase.[84] Trooper Chugg included a reference to Swenson's identification of the car occupants as "tribal males" in his written report based on what he was displayed on his CAD screen, not what he heard over dispatch.[85]

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80. Byron Dep. 95, 97.

81. *Id.*

82. Davis Dep. 55.

83. Watkins Dep. 78-79; Byron Dep. 84; Young Dep. 50.

84. Young Dep. 50; Olsen Dep. 78.

85. Chugg Dep. 108-109.

Based on the evidence before the court, no reasonable juror could conclude that these two statements by Trooper Swenson initiated a racially-motivated conspiracy against Mr. Kurip and Mr. Murray, that led to Mr. Murray's death at the hand of Detective Norton.

Similarly, no reasonable juror could find that Detective Norton's description of the men in the car as Hispanic supports Plaintiffs' contention that Detective Norton's conduct, and the conduct of the other Individual Defendants, was motivated by racial animus against Native Americans.[86] Indeed, the fact that Trooper Swenson and Detective Norton reached different conclusions about the ethnicity of men in the car suggests otherwise.

Detective Norton did not start following Trooper Swenson in the high speed chase because of Trooper Swenson's characterization of the car occupants as "tribal," nor did he continue to follow Trooper Swenson's car for that reason. Detective Norton did not have a radio in his private car and did not hear Trooper Swenson's first comment about the driver appearing to be "tribal." Detective Norton testified that while off-duty he observed what he believed to be a high speed chase, and that he called dispatch to determine if the chasing officer had any back up assistance.[87] Upon learning that he was the officer closest to Trooper Swenson, Detective Norton started to

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86. Detective Norton states that he thought the men were Hispanic because they were in a car with Nevada license plates. Norton Dep. 115.

87. *See* Norton Dep. 107-108, 116-118.

follow Trooper Swenson, even though he lost sight of him quickly because of the chase speeds.[88] No reasonable juror could conclude that Detective Norton's statement that the car occupants appeared to be Hispanic, or even his decision to follow Trooper Swenson after that, is evidence of racial animus toward Native Americans.

Finally, Plaintiffs argue that the relationship between Native Americans in Utah and Utah State police officers is rife with racial tension and animosity, and that the strained relationship between Native Americans and police officers in Utah supports a conclusion of racial animus in support of civil conspiracy in this case. They point to the testimony of Deputy Byron and Deputy Slaugh to support their position.[89] But even construing that evidence most favorably for the Plaintiffs, the best that Plaintiffs could argue is that some Native Americans have negative views toward members of law enforcement, and that some members of law enforcement may have negative views toward particular Native Americans. There is nothing that links that negativity to the events that precipitated this case. And the testimony of Deputy Byron and Deputy Slaugh is clear that despite disagreements with individual Native Americans, or moments of frustration with Native Americans, the officers do their best to respond to such

88. *See id.* at 121.

89. *See* Byron Dep. 171-173; *see also* Slaugh Dep. 164-170. Deputy Byron was part of the Uintah County Sheriff's office, and could not have spoken to racial relations between Native Americans and "Utah state police officers" as Plaintiffs suggest. Deputy Slaugh's testimony speaks to racial tension, but at most it is tension between the Uintah County Sheriff's office, not Utah State police officers generally.

disagreements and frustrations professionally and do not use the negative experiences that they have had as a justification for misconduct.

Whether these facts are considered separately or together, no reasonable jury could find that the facts offered by the Plaintiffs amount to invidious racial animus toward Native Americans generally, or Mr. Murray in particular. There is no other evidence in the record that makes a stronger showing. Plaintiffs' theory is that the Defendants responded to, and participated in, the chase because, as Plaintiffs' counsel suggested, "They were hunting themselves an Indian . . . ."[90] No reasonable jury could reach that conclusion, and neither can the court.

2. Conspiratorial Acts

Even if the evidence supported the necessary finding of racial animus, the Individual Defendants argue that there is no evidence of conspiracy and no evidence of overt acts in furtherance of a conspiracy. Defendants also argue that there is no state court proceeding, and therefore no obstruction of justice in that forum, necessary components for a claim under § 1985(2).

In their responses to the motions for summary judgment, Plaintiffs do not point to any direct testimonial or documentary evidence before the court to show that two or more defendants agreed to a conspiracy to violate Mr.

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90. (*See* May 2, 2013 Status Conference Tr. (Docket No. 366) at 118.)

Murray›s civil rights. Instead, the Plaintiffs repeatedly ask the court to infer the existence of such a conspiracy (much like they asked the court to infer racial animus) from a handful of facts and the Plaintiffs› speculative characterization of those facts as so "brazen and flagrant" and "unjustifiable and irrational" that they support a finding of conspiracy.[91]

Plaintiffs argue that "[i]t is clear from the totality of the circumstances that all the law enforcement officers acted in concert to assure [sic] that Mr. Murray would not survive to tell his version of the events . . . ."[92] As evidence of this conspiratorial aim, the Plaintiffs argue that Defendants (1) failed to give Mr. Murray medical aid; (2) destroyed evidence; (3) participated in a racially-based illegal chase; (4) offered inconsistent stories; (5) participated in conversations about the events; and (6) communicated by cell phone. The focus of the Plaintiffs'

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91. (Pls.' Mem. Opp'n to Norton's Mot. Summ. J. (Docket No. 321) at 20-21); (Pls.' Mem. Opp'n to Byron's Mot. Summ. J. (Docket No. 324) at 15, 17, 19); (Pls.' Mem. Opp'n to Slaugh & Watkins' Mot. Summ. J. (Docket No. 327) at 19, 21, 23); (Pls.' Mem. Opp'n to Swenson's Mot. Summ. J. (Docket No. 322) at 17-19, 21); (Pls.' Mem. Opp'n to Young's Mot. Summ. J. (Docket No. 325) at 18-20, 22); (Pls.' Mem. Opp'n to Chugg, Davis, & Olsen's Mot. Summ. J. (Docket No. 326) at 16-17, 19.)

92. (Pls.' Mem. Opp'n to Norton's Mot. Summ. J. (Docket No. 321) at 21); (Pls.' Mem. Opp'n to Byron's Mot. Summ. J. (Docket No. 324) at 19); (Pls.' Mem. Opp'n to Slaugh & Watkins' Mot. Summ. J. (Docket No. 327) at 22); (Pls.' Mem. Opp'n to Swenson's Mot. Summ. J. (Docket No. 322) at 18-19); (Pls.' Mem. Opp'n to Young's Mot. Summ. J. (Docket No. 325) at 20); (Pls.' Mem. Opp'n to Chugg, Davis, & Olsen's Mot. Summ. J. (Docket No. 326) at 18.)

conspiracy theory is the failure to give aid and their spoliation argument about the destruction of evidence. But they raise the other issues in their responses to the Defendants' motions for summary judgment, so the court addresses them.

A conspiracy "requires the combination of two or more persons acting in concert." *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1126 (10th Cir. 1994) (quoting *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1230 (10th Cir. 1990)). The Plaintiffs have not established direct evidence of a meeting of the minds or agreement among the Defendants.

Of course, "[r]arely in a conspiracy case will there be direct evidence of an express agreement among all the conspirators to conspire." *See Snell v. Tunnell*, 920 F.2d 673, 702 (10th Cir. 1990) (quoting *Bell v. City of Milwaukee*, 746 F.2d 1205, 1260 (7th Cir. 1984)). And sometimes the "sequence of events" in a case will create "a substantial enough possibility of a conspiracy" to allow Plaintiffs to proceed to trial. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

But for Plaintiffs to establish an agreement to conspire based on circumstantial evidence, they have to show more than that Defendants acted or didn't act. "Parallel action . . . or inaction . . . does not necessarily indicate an agreement to act in concert." *Salehpoor v. Shahinpoor*, 358 F.3d 782, 789 (10th Cir. 2004). There have to be real questions of fact and gaps that Defendants fail to, and cannot, explain. *See Adickes*, 398 U.S. at 157-59.

An examination of the evidence Plaintiffs rely on fails to make this showing. The court will discuss each in turn.

a. Failure to Give Medical Aid

As discussed more below, the evidence before the court shows that the Individual Defendants believed that Mr. Murray was gravely injured and that medical care was imminent because the ambulance was en route. The evidence also shows that none of the Individual Defendants provided first aid to Mr. Murray. But the Plaintiffs' conclusion, that the Individual Defendants did not provide aid to Mr. Murray because they wanted him to die so that his version of the events with Detective Norton would be lost, is too speculative based on the evidence before the court. Standing alone, the fact that none of the Defendants gave aid to Mr. Murray is not sufficient to show that the Defendants failed to act because of a common conspiratorial objective.

Discussing conspiracy actions brought under § 1983 and § 1985, the Tenth Circuit Court of Appeals stated:

> [W]e have generally held a federal conspiracy action brought under either of these statutes requires at least a combination of two or more persons acting in concert and an allegation of a meeting of the minds, an agreement among the defendants, or a general conspiratorial objective. In addition, while we have said allegations of a conspiracy may form the basis of a § 1983 claim, we have also held "a plaintiff

> must allege specific facts showing an agreement and concerted action amongst the defendants" because "[c]onclusory allegations of conspiracy are insufficient to state a valid § 1983 claim."

Brooks v. Gaenzle, 614 F.3d 1213, 1227-28 (10th Cir. 2010) (quoting *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 533 (10th Cir. 1998)) (internal citations omitted). In sum, there is no evidence before the court to support a finding that the inaction by each individual defendant was part of a conspiracy to let Mr. Murray die.

b. Failure to Preserve Evidence

After carefully considering all of the arguments and evidence raised by the parties, as well as taking oral testimony from experts and the Defendants, the court denied the Plaintiffs' motion for sanctions based on spoliation of evidence.[93] The court found that the Defendants were not liable for spoliation.

Based on the facts as detailed and explained in its spoliation order, the court concludes that no reasonable jury could conclude that Defendants conspired to "effectively eliminate[] all probative evidence"[94] and "clean

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93. (*See* March 7, 2014 Mem. Decision & Order on Spoliation (Docket No. 429).)

94. (Pls.' Mem. Opp'n to Norton's Mot. Summ. J. (Docket No. 321) at 17); (Pls.' Mem. Opp'n to Byron's Mot. Summ. J. (Docket No. 324) at 15); (Pls.' Mem. Opp'n to Slaugh & Watkins' Mot. Summ. J. (Docket No. 327) at 19); (Pls.' Mem. Opp'n to Swenson's Mot. Summ.

the closet of evidence that would have allowed Plaintiffs to build their case."[95]

c. Participation in Racially-based Illegal Chase

While the Plaintiffs allege that Detective Norton and Trooper Swenson, as well as the other Defendants, were illegally chasing Mr. Kurip and Mr. Murray because they were Native Americans, and that the officers illegally chased them on tribal land, the evidence is clear that those two officers did not even agree about the ethnicity of Mr. Kurip and Mr. Murray.

Furthermore, there is no evidence that Detective Norton communicated with the other Defendants during the high speed chase. In fact, the evidence shows that Trooper Swenson and Detective Norton did not communicate during the chase, and had only brief contact once that chase ended at Turkey Track.[96] That is not sufficient to give rise to an inference that they conspired.

J. (Docket No. 322) at 16); (Pls.' Mem. Opp'n to Young's Mot. Summ. J. (Docket No. 325) at 18); (Pls.' Mem. Opp'n to Chugg, Davis, & Olsen's Mot. Summ. J. (Docket No. 326) at 16.)

95. (Pls.' Mem. Opp'n to Norton's Mot. Summ. J. (Docket No. 321) at 19); (Pls.' Mem. Opp'n to Byron's Mot. Summ. J. (Docket No. 324) at 17); (Pls.' Mem. Opp'n to Slaugh & Watkins' Mot. Summ. J. (Docket No. 327) at 20); (Pls.' Mem. Opp'n to Swenson's Mot. Summ. J. (Docket No. 322) at 17); (Pls.' Mem. Opp'n to Young's Mot. Summ. J. (Docket No. 325) at 18); (Pls.' Mem. Opp'n to Chugg, Davis, & Olsen's Mot. Summ. J. (Docket No. 326) at 17.)

96. *See* Swenson Dep. 134; *see also* Norton Dep. 126-28.

See Abercrombie v. City of Catoosa, 896 F.2d 1228, 1230-31 (10th Cir. 1990).

The evidence shows that the Defendants were responding to a rapidly-unfolding and unpredictable situation that involved a half-hour car chase of at least 120 miles per hour, two car crashes, and travel through more than two residential areas where there was increased risk to the public. During that time, Trooper Swenson was concerned about the safety of Mr. Kurip and Mr. Murray given the high speed of the chase.[97] No reasonable jury could conclude that the Defendants' responses to the high speed chase reflected an agreement to violate Mr. Murray's civil rights because of this race.

d. Inconsistent Stories

Plaintiffs allege that the version of events given by Deputy Byron "directly contradicts" Detective Norton's description about what happened when Mr. Murray was shot, and they argue that "Defendants have conspired to tell a common story about what happened; however, as is common with fabrications, the factual details are not congruent."[98] The Plaintiffs base these sweeping conclusions on the following: Detective Norton testified that he believed that Mr. Murray paused in the moment

97. *See* Swenson Dep 111-12.

98. (Pls.' Mem. Opp'n to Norton's Mot. Summ. J. (Docket No. 321) at 19); (Pls.' Mem. Opp'n to Byron's Mot. Summ. J. (Docket No. 324) at 16-17); (Pls.' Mem. Opp'n to Slaugh & Watkins' Mot. Summ. J. (Docket No. 327) at 20.)

before he shot himself, but Deputy Byron testified that he saw Mr. Murray walking, heard the shots, noticed that Detective Norton was no longer on the top of the hill, and then saw Mr. Murray drop.[99] Deputy Byron's testimony is silent about what Mr. Murray was doing in the seconds before he dropped. As both officers were making their way through rough terrain, it is unlikely that both officers had their eyes on Mr. Murray at every second. Detective Norton testified he was scrambling up the rocky hillside while trying to make a call on his cell phone and keep his gun pointed at Murray. Deputy Byron testified that he and Trooper Young were making their way through some "pretty rough country."[100] This evidence does not establish a conspiracy or even that Detective Norton's story is necessarily inconsistent with Deputy Byron's.

e. Delayed Ambulance Arrival

Plaintiffs also allege that Deputy Watkins and Deputy Slaugh conspired to "ensure that Murray would not live to tell his version of what happened" by slowing down the ambulance that was en route to the scene and by directing the ambulance to an "impassable" ridge so that it would take longer to reach Mr. Murray.[101] There is simply no evidence before the court to support this argument.

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99. Byron Dep. 96-97.

100. Byron Dep. 97.

101. (Pls.' Mem. Opp'n to Slaugh & Watkins' Mot. Summ. J. (Docket No. 327) at 17.)

f. Participated in Conversations about Events

Plaintiffs point to the fact that officers Chugg, Davis, and Olsen spoke to each other about the events that took place on April 1, 2007.[102] They cite to *Krilich v. Village of South Holland*, 1994 U.S. Dist. LEXIS 11673, 1994 WL 457227 (N.D. Ill. 1994), for the proposition that conspiracy can be inferred, simply, from evidence of a conversation between defendants. While there are several distinctions that can be made between this case and *Krilich* on the facts, the one that matters is that the alleged conversations that took place in *Krilich* occurred before the alleged constitutional violations. And, based on the evidence before the *Krilich* court, there was a genuine issue of material fact about whether the officers discussed the plaintiff before arresting him in violation of his constitutional rights. *See* 1994 U.S. Dist. LEXIS 11673, [WL] at *3.

Here, there is no evidence before the court that the conversations cited by the Plaintiffs [103] were about Mr. Murray and a plan to withhold medical aid and destroy evidence. The only conversations cited by the Plaintiffs were conversations between officers Davis, Chugg, Olsen, and Swenson. And Trooper Swenson was not implicated in the failure to give aid or preserve evidence related to Mr. Murray's death.

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102. (Pls.' Mem. Opp'n to Chugg, Davis, & Olsen's Mot. Summ. J. (Docket No. 326) at 16.)

103. Davis Dep. 26; Chugg Dep. 42-43, 78, 82-83, 85; Olsen Dep. 114-15.

Appendix B

The testimony offered by the Plaintiffs about the conversations that occurred on April 1, 2007, the date of the alleged constitutional violations, can be summarized as follows: Officer Davis testified that he spoke with Trooper Swenson when he arrived at the Turkey Track crash site, and that Trooper Swenson directed him to the oil location road. Trooper Chugg testified that he spoke with Trooper Swenson at the crash site and they discussed the high speed chase. Trooper Chugg could not remember any details about what Trooper Young told him when he arrived at the shooting scene and he testified that he never spoke with Deputy Slaugh at the scene or after. Trooper Chugg also testified that he did not recall any conversations with Officer Davis at the scene or after.

After April 1, 2007, Plaintiffs cite to testimony showing that Officer Davis had a conversation with Trooper Olsen about this lawsuit, that Trooper Chugg spoke with Trooper Swenson to discuss the criminal charges that were brought against Mr. Kurip, and that Trooper Olsen testified that he interviewed Trooper Swenson about the chase and the instant litigation. No reasonable jury could find that those conversations are evidence of a conspiracy to deprive Mr. Murray of medical aid or access to state court.

Significantly, most of the conversations identified by the Plaintiffs took place *after* the alleged constitutional violations at the heart of Plaintiffs' theory about the conspiracy. If the court were to take the conversations as circumstantial evidence of a conspiracy, namely to withhold medical aid and destroy evidence, the

conversations would have had to occur before the failure to give aid and preserve evidence.

g. Cell Phone Communication

Finally, in their response to Trooper Swenson's motion for summary judgment, the Plaintiffs argue that the officers "switched from their police radios to their cell phones so that their communications after the shooting would not be recorded and preserved."[104] They do not indicate in their response which Defendants used their cell phones or how that use linked them to the conspiracy. The fact that the officers used cell phones to communicate once they were out of their vehicles and out of range of their radios does not amount to circumstantial evidence of a conspiracy. Moreover, the evidence is clear that Detective Norton used his cell phone because he was in his private car and did not have a dispatch radio with him.

As noted above, the record reflects that the radio signal in the remote area where the events unfolded was poor and made communication over the dispatch radio difficult. Words were dropped. Phrases were lost. There is no evidence to support Plaintiffs' purely speculative conclusion. The only evidence before the court is the difficulty of communicating by radio and the improved communication with cell phones.

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104. (Pls.' Mem. Opp'n to Swenson's Mot. Summ. J. (Docket No. 322) at 15.)

In sum, the Plaintiffs have not established the existence of a conspiracy, which is a prerequisite to a claim under § 1985(2) and § 1985(3). Accordingly, the Individual Defendants and Vernal City are entitled to summary judgment on the ninth and tenth causes of action.

3. Failure to give Medical Aid

In their summary judgment motions, the Defendants argue that there were no violations of Mr. Murray's civil rights. They also argue that even if there were violations of Mr. Murray's civil rights, they were entitled to qualified immunity for any such acts.

Plaintiffs originally argued there were numerous civil rights violations at the center of the alleged conspiracies. But at this stage in the litigation, Plaintiffs focus on two issues for all of the Individual Defendants: (1) failure to give medical aid to Mr. Murray, and (2) interference with Mr. Murray's due process right of access to courts via the failure to preserve critical evidence and the affirmative destruction of critical evidence. Plaintiffs argue that the evidence surrounding these two allegations require the court to infer not only the existence of a conspiracy (an agreement to conspire and overt acts in furtherance of the conspiracy), but also the substantive conclusions that Mr. Murray's civil rights were violated by the failure to give aid and that the spoliation of evidence prevented him from seeking redress in state court.

In their complaint, Plaintiffs allege a number of § 1983 violations and then use those alleged violations as examples of overt acts in furtherance of the alleged § 1985

conspiracy causes of action. But Plaintiffs do not plead the failure to give medical aid in this way. That alleged civil rights violation is something that the Plaintiffs only allege as part of their § 1985(2) and § 1985(3) conspiracy claims and not as a stand-alone violation under § 1983. When asked about this apparent discrepancy, Plaintiffs› counsel responded that the failure to give medical aid was included in the failure to intervene section of the complaint, which is the fifth cause of action, but deferred argument on this to her co-counsel.[105] Co-counsel argued that paragraph 108 of the fifth cause of action, which addresses unlawful use of excessive and deadly force, encompassed the failure to give aid because of its reference to substantive due process. Paragraph 108 is not about failure to give aid. Plaintiffs did not offer a convincing explanation about how failure to give aid was included in their failure to intervene cause of action. But because the Defendants address the failure to give aid argument in their motions for summary judgment, the court will address it on the merits.

Plaintiffs make no distinction among the Defendants named in the ninth and tenth causes in terms of the alleged failure to give medical aid. Instead, they lump all of "the Defendants" together. In doing so, they fail to identify the action taken (or not taken) by specific Defendants.

Not all of the named Individual Defendants were in a position to give medical aid to Mr. Murray. Lieutenant Chugg, for example, arrived at the scene after the ambulance had already left with Mr. Murray. Troopers

105. (*See* May 2, 2013 Status Conference Tr. (Docket No. 366) at 113.)

Olsen and Swenson never went to the shooting scene at all. The court only considers this alleged violation against officers Norton, Byron, Young, Davis, Watkins, and Slaugh.

By 11:22 a.m., there were two ambulances on standby because of the high speed chase.[106] By 11:31 a.m., just before Detective Norton called central dispatch about the exchange of fire and to report that Mr. Murray shot himself in the head, both ambulances were already on their way to Turkey Track because of the crash at the end of the chase.[107] By 11:41 a.m., Deputy Byron and Trooper Young had reached Mr. Murray's body, and Deputy Byron had rolled Mr. Murray onto his side and placed him in handcuffs. Trooper Young asked central dispatch to advise the ambulance that Mr. Murray was unconscious and had labored breathing.[108] At 12:01 p.m., according to the dispatch clock, the ambulance was reportedly a few minutes away.[109] The Gold Cross Ambulance assessment form indicates that the emergency medical technicians had contact with Mr. Murray at 12:02 p.m., that he was unconscious, that his breathing was still labored, and that his pupils were fixed and dilated.[110]

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106. (*See* Police Audio Dispatch Tr., Ex. 5 to Defs.' Mem. Opp'n App. (Docket No. 306-5) at 22-23.)

107. (*See* Police Audio Dispatch Tr., Ex. 5 to Defs.' Mem. Opp'n App. (Docket No. 306-5) at 30-31.)

108. (*See id.* at 40.)

109. (*See id.* at 45-46.)

110. (*See* Ambulance Report, Ex. W to Pls.' Mot. Default J. (Docket No. 258-24) at 2.)

Once Deputy Byron handcuffed him, Mr. Murray was under the care and control of the officers at the scene of the shooting and had to rely upon them to provide medical care, even though his injury was self-inflicted. The officers were obligated to provide that medical care to him. "[W] hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *See DeShaney v. Winnebago County. Dept. of Social Servs.*, 489 U.S. 189, 199-200, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989); *see also Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983) (Due Process Clause requires state actors to provide medical care to suspects in police custody); *see also Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) (the Eighth Amendment requires officials to provide medical care to prisoners).

Summoning an ambulance and making sure that the injured suspect is "taken promptly to a hospital" is constitutionally required. *See Revere*, 463 U.S. at 245. Defendants argue that once they called for an ambulance and EMTs to provide medical care to Mr. Murray, they had discharged their constitutional obligations. The evidence before the court is clear that an ambulance was en route when Mr. Murray shot himself, that the ambulance personnel were told that there was someone with a gunshot wound and labored breathing, and that, when the ambulance arrived, emergency medical technicians provided Mr. Murray with medical care and took him to the hospital.

But Plaintiffs argue that the failure to try and stop bleeding from the entry and exit wounds in his skull, as well the failure to provide cardiopulmonary resuscitation, amounted to a civil rights violation.

The Tenth Circuit, following the Ninth Circuit, has refused to find that the due process clause establishes an affirmative duty on police officers to provide medical care—even something as basic as CPR—in any and all circumstances. "[T]here is no duty to give, as well as summon, medical assistance, even if the police officers are trained in CPR." *See Wilson v. Meeks*, 52 F.3d 1547, 1555 (10th Cir. 1995); *see also Maddox v. City of Los Angeles*, 792 F.2d 1408, 1411, 1415 (9th Cir. 1986). The *Wilson* court made a distinction between the provision of "medical care" that only "highly trained personnel" can provide and "first aid" that "anyone" can provide. *See Wilson*, 52 F.3d at 1555-56.

While it is true that "anyone can render first aid," the nature of any given injury faced by police officers in a rapidly unfolding and dynamic situation may dictate whether providing first aid is actually a good idea. Indeed, there may be medical disagreement about how best to proceed. *See id.* at 1555-56. First aid is often viewed as a "limited intervention with the immediate goal of preventing death," but even attending to an injured person's airway, breathing, and circulation "ABC" could be problematic depending on the nature of the injury. *Id.* at 1556. In *Wilson*, for example, there was disagreement about whether breathing is best facilitated by lying on one's side or one's back. *Id.* To legally require police

officers to provide first aid, or to take specific action, in every situation (and to hold them legally responsible for civil rights violations when they fail to do so) is, in the words of the Tenth Circuit, "unfair and unwise." *Id.*

But under the Eighth Amendment and the Due Process Clause, delay in medical care can be a constitutional violation when that delay results in "substantial harm" and when the government actor was "deliberately indifferent" to the risk of that harm. *See Sealock v. Colorado*, 218 F.3d 1205, 1210 (10th Cir. 2000) (citing *Olson v. Stotts*, 9 F.3d 1475, 1477 (10th Cir. 1993)); *see also Howard v. Dickerson*, 34 F.3d 978, 980-81 (10th Cir. 1994) (Eighth Amendment standard of deliberate indifference applies in the context of due process analysis).

Considered from this perspective, the question is whether, based on the evidence before the court, a reasonable jury could find that the officers were "deliberately indifferent" to Mr. Murray's medical needs because they did not perform CPR or try to staunch the flow of blood from Mr. Murray's head. That question has objective and subjective elements: (1) whether the need for medical care was sufficiently serious; and (2) whether the Defendants acted with sufficient culpability in failing to render that care. *See Oxendine v. Kaplan*, 241 F.3d 1272, 1276 (10th Cir. 2001) (quoting *Perkins v. Kan. Dept. of Corr.*, 165 F.3d 803, 809 (10th Cir. 1999)). A medical need or injury is considered "sufficiently serious" when a physician determines that it requires treatment or when it is "so obvious" that even a lay person could recognize the need for medical attention. *Sealock*, 218 F.3d at 1209

(quoting *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999)). There is no question that Mr. Murray's head wound met the threshold question of being "sufficiently serious."

An analysis of the subjective element of deliberate indifference requires the court to determine whether the Defendants knew that Mr. Murray faced "a substantial risk of harm" if they didn't stop the blood flow and attempt CPR and whether the Defendants nevertheless disregarded that risk of harm with deliberate indifference by failing to take "reasonable measures" to abate it. *See Oxendine*, 241 F.3d at 1276. Would trying to stop the blood flow from the bullet holes and attempting CPR have been "reasonable measures" given Mr. Murray's injuries and condition? Based on the evidence before it, the court finds that no reasonable jury could conclude that the Defendants' failure to try and stop Mr. Murray's bleeding while they waited for the ambulance to arrive resulted in "substantial harm" to Mr. Murray, and that Defendants nevertheless disregarded the risk of that harm.

Plaintiffs' theory is that the Defendants acted "in concert to assure that Mr. Murray would not survive,"[111] and that if Defendants had provided medical aid to Mr. Murray while waiting for the ambulance to arrive, he "might have survived to give his own account of the encounter" with Detective Norton and the other Defendants.[112]

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111. (Pls.' Mem. Opp'n to Norton's Mot. Summ. J. (Docket No. 321) at 21.)

112. (*Id.* at 17.)

That Mr. Murray "might" have survived had he received medical aid before the ambulance arrived is all that the Plaintiffs can argue because there is no evidence before the court that Mr. Murray could have or would have survived his self-inflicted head wound, even if the Defendants had attempted to give first aid to Mr. Murray. There is no evidence before the court that Defendants could have stopped Mr. Murray's bleeding if they had tried, or that he would have survived had the bleeding stopped.

What is before the court is the testimony of physician Dr. Edward Leis, who is the Chief of the Utah State Office of the Medical Examiner. Dr. Leis testified that Mr. Murray's head wound was a fatal one, that the pathway of the bullet, the location of the entrance and exit wounds, and the trauma to the brain tissue were not survivable.[113] Even if the bleeding had been stopped, Dr. Leis testified that Mr. Murray would have died from the brain swelling as a result of the bullet trauma.[114] Based on those facts, no reasonable jury could find that first aid given by Individual Defendants while they waited for the ambulance to arrive could have saved Mr. Murray, or that Mr. Murray's death was caused by the Individual Defendants' failure to provide that aid as the Plaintiffs suggest.

The report of Plaintiffs' criminal justice expert William T. Gaut, Ph.D., who is not a medical doctor, does

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113. (June 6, 2013 Evidentiary Hr'g Tr. (Docket No. 421) at 71-73.)

114. (*Id.* at 71-72.)

not create a question of material fact on these issues. Dr. Gaut concedes that gunshot wounds to the head are "usually fatal."[115] While he also suggests that "many victims of gunshot injuries to the head survive,"[116] there is no evidence before the court that Mr. Murray would have been or could have been one of those survivors.

Officers Norton, Byron, Young, Davis, Slaugh, and Watkins all testified that they did not take any steps to stop the bleeding from Mr. Murray's head. They offered a variety of reasons for not trying to stop Mr. Murray's bleeding. Some stated that they did not help because they did not believe that there was anything they could do to help him and that, given the severity of the wounds, there was no way to stop the bleeding.[117] Some stated that they did not have the expertise to deal with traumatic head injuries and were afraid of doing more harm than good, especially since the ambulance was en route.[118] And Deputy Watkins added that while the Uintah County Sheriff Department protocol and procedure required officers to get medical

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115. (*See* Gaut Report, Ex. I to Pls.' Mot. Default J. (Docket No. 258-10) at 14.)

116. (*Id.*)

117. *See* Young Dep. 132; Slaugh Dep. 135; Watkins Dep. 102-03. Byron testified that he had basic first aid training about how to "patch" someone and that while he carried a "basic first aid kit" in his car, it was "small." Byron Dep. 136. Watkins also references his "basic" first aid kit and implies that not only did he not have it on him, but also that it was not adequate for the job. Watkins Dep. 104.

118. Norton Dep. 164; Byron Dep. 136; Davis Dep. 142; Slaugh Dep. 135.

aid to the scene as quickly as possible, there was nothing that required officers to administer aid.[119]

None of that testimony could allow a reasonable jury to conclude that Individual Defendants were deliberately indifferent to Mr. Murray's situation, or that they knew that there was a substantial risk of significant harm to Mr. Murray if they did not provide first aid. If anything, the evidence shows that at least three of the Individual Defendants (Young, Davis, and Slaugh) were concerned that attempts to provide any kind of aid to Mr. Murray would do more harm than good.[120]

4. Obstruction of Court Access and Failure to Preserve Critical Evidence

The court has discussed the Plaintiffs' claim that the Defendants failed to preserve evidence in its spoliation order and will not repeat it here.

The Plaintiffs' argument under § 1985(2) is that they have been denied judicial redress in state court because of the Defendants› conspiratorial actions of tampering with, and destroying, evidence and letting Mr. Murray die.[121] In

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119. Watkins Dep. 102.

120. *See* Young Dep. 132; *see* Davis Dep. 109, 142; *see* Slaugh Dep. 135.

121. (Pls.' Mem. Opp'n to Norton's Mot. Summ. J. (Docket No. 321) at 15-16); (Pls.' Mem. Opp'n to Byron's Mot. Summ. J. (Docket No. 324) at 12-13); (Pls.' Mem. Opp'n to Slaugh & Watkins' Mot. Summ. J. (Docket No. 327) at 14-15); (Pls.' Mem. Opp'n to Swenson's

some of their responses, the Plaintiffs argue that if their federal claims were dismissed, they could be remanded back to state court but because of Defendants' conduct, they would be prohibited from effectively litigating Mr. Murray's rights.[122]

There is no question that Plaintiffs have the due process right to have their legitimate claims of civil rights violations heard in court. Indeed, this court is carefully considering all of the Plaintiffs' claims. But no reasonable jury could find that the Plaintiffs have been denied their right to litigation in state court because of the Defendants' alleged conspiratorial conduct. As the court found above, as well as in its spoliation order,[123] the Defendants did not violate Mr. Murray's civil rights for failing to provide medical aid, nor did the Defendants fail to preserve evidence. Plaintiffs are in federal court instead of state court not because of the Defendants' failures on April 1, 2007, and during the ensuing investigation, but because the Plaintiffs chose to raise federal questions in their complaint, federal questions that allowed the Defendants to remove the case to federal court.

Mot. Summ. J. (Docket No. 322) at 14-15); (Pls.' Mem. Opp'n to Young's Mot. Summ. J. (Docket No. 325) at 15-16); (Pls.' Mem. Opp'n to Chugg, Davis, & Olsen's Mot. Summ. J. (Docket No. 326) at 13-14.)

122. (Pls.' Mem. Opp'n to Byron's Mot. Summ. J. (Docket No. 324) at 13); (Pls.' Mem. Opp'n to Slaugh & Watkins' Mot. Summ. J. (Docket No. 327) at 15); (Pls.' Mem. Opp'n to Chugg, Davis, & Olsen's Mot. Summ. J. (Docket No. 326) at 14-15.)

123. (*See* March 7, 2014 Mem. Decision & Order on Spoliation (Docket No. 429).)

Appendix B

Municipal Defendant

The only municipal defendant named in the ninth and tenth causes of action is Vernal City. In its motion for summary judgment, Vernal City argues that there is no respondeat superior liability if the respective officers have not committed a civil rights violation.

Detective Norton is the only Individual Defendant who worked for Vernal City. The court has found that he is not liable for conspiracy under either § 1985(2) or § 1985(3). Accordingly, Vernal City does not have any liability.

D. Non-Conspiracy Claims Against the Municipalities[124]

The Plaintiffs have named two municipalities—the City of Vernal and Uintah County—in their § 1983 claims for failing to train, supervise, and implement policies that would ensure that their officers (1) did not exceed the municipalities› jurisdictional authority, (2) had probable cause to arrest, and (3) did not use excessive force. "A plaintiff suing a municipality under section 1983 for the acts of one of its employees must prove: (1) that a municipal employee committed a constitutional violation, and (2) that a municipal policy or custom was the moving force behind the constitutional deprivation." *Myers v. Okla. County Bd. of County Comm'rs*, 151 F.3d 1313, 1318 (10th Cir. 1998) (citing *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). The Plaintiffs must

124. The City of Vernal is also named in the Plaintiffs' conspiracy claims, but analysis of Vernal City's role, if any, in a conspiracy, is contained in the portion of this order discussing the conspiracy claims.

also demonstrate that the municipality's action amounted to "*deliberate indifference* to the rights of persons with whom the police come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989) (emphasis added), *quoted in Myers*, 151 F.3d at 1318; *see also Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997) ("As our § 1983 municipal liability jurisprudence illustrates, . . . a plaintiff must show that the municipal action was taken with the *requisite degree of culpability* and must demonstrate a *direct causal link* between the municipal action and the deprivation of federal rights.") (emphasis added).

Because the court has found that only one constitutional violation occurred (the handcuffing of Mr. Murray by Deputy Byron on the Reservation), only Uintah County, as Deputy Byron's employer, faces potential liability under § 1983. The City of Vernal is not liable, because "[w]hen there is no underlying constitutional violation by a [municipality] officer, there cannot be an action for failing to train or supervise the officer." *Apodaca v. Rio Arriba County Sheriff's Dep't*, 905 F.2d 1445, 1447-48 (10th Cir. 1990) (citing *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986)); *see also Taylor v. Meacham*, 82 F.3d 1556, 1564 (10th Cir. 1996) ("[O]nce we conclude that the employee . . . committed no constitutional violation, the claim against the supervisory authority . . . is properly dismissed.").[125]

125. For the same reason, the court need not address the Plaintiffs' claims of municipal liability against Uintah County for probable cause or excessive force violations, because no Uintah County officer committed any such violation.

Uintah County asserts that even if Deputy Byron's handcuffing of Mr. Murray on Reservation land was a constitutional violation, Deputy Byron did not know, nor could he have known, that Mr. Murray was an enrolled member of the Tribe, and so there is no evidence of a causal link to any failure to train, supervise, or implement proper policies concerning officers' jurisdiction. While it is true that Deputy Byron could not have known Mr. Murray's legal status before the seizure occurred, that fact is irrelevant to the issue of whether the County is liable. Rather, the court must focus on two related issues. First, the court must determine whether the County failed to train or supervise Deputy Byron concerning his authority to exercise law enforcement duties on the Reservation. Second, the court must determine whether the County caused Deputy Byron to act first and ask questions later. If the answer to either question is yes (i.e., if the court finds a causal link), the court must then determine whether the County's action (or failure to act) was deliberately indifferent to the constitutional rights of others.

There is no question that Uintah County instructed its officers on the facts and issues underlying the County's jurisdiction (or lack thereof) on the Reservation. For example, the Uintah County Sheriff's Office gave its officers maps and GPS devices so they could determine where they had jurisdiction. The record does not support a finding of liability for *failure* to train or supervise.

But the record does show that the County had a potentially problematic practice of responding to all

emergency calls on the Reservation when the suspect's tribal status was not known. The officers were taught to apprehend an individual first and *then* determine who had jurisdiction over that person. Certainly this practice was a moving force behind Deputy Byron's (and the others') pursuit of Mr. Murray and the subsequent handcuffing. But the practice was not deliberately indifferent.

Plaintiffs contend that the practice was clearly in violation of the rule set forth in *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990), but *Ross* did not provide guidance in this situation. There, the Tenth Circuit clarified that the arrest of an enrolled member of the Tribe on Reservation land by a municipal law enforcement officer was a constitutional violation of the tribal member's Fourth Amendment rights. *Id.* at 1354 (a "warrantless arrest executed outside of the arresting officer's jurisdiction [that is, on tribal land] is analogous to a warrantless arrest without probable cause" and is "presumptively unreasonable."). *Ross* did not address an emergency situation such as the one at issue here (a high speed chase, unknown fleeing suspects, and gun shots) in which the officers had no way of determining the legal status of the fleeing suspect or the land before responding to the emergency call.

Also, the failure to implement such a practice would arguably result in the County's and officers' dereliction of their duties to enforce the law. In other words, the alternative practice suggested by the Plaintiffs—that the officers should not have pursued Mr. Murray run because he appeared to be a tribal member—would have resulted in letting Mr. Kurip, who was *not* a "tribal male" and

so was subject to the County's jurisdiction, flee without pursuit. The County's practice avoided that unwanted result and was an attempt to protect members of the public.

In the absence of any clear legal guidance cited by the Plaintiffs, and given the motivation behind the practice, the County's choice to implement such a practice was not deliberately indifferent to others' rights. Accordingly, Uintah County is not liable under 42 U.S.C. § 1983.

E. State Law Claims

The Plaintiffs have alleged two state law claims against Detective Norton: (1) Assault and Battery and (2) Wrongful Death. Because the court has original jurisdiction over the Plaintiffs' federal law claims, the court automatically has supplemental jurisdiction over those two related state law claims because they form part of the same case or controversy. 28 U.S.C. § 1367(a). Because the court is now dismissing all of the claims over which it has original jurisdiction, the court declines to exercise supplemental jurisdiction over the Assault/Battery and Wrongful Death claims. *See* 28 U.S.C. § 1367(c) ("The district courts may decline to exercise supplemental jurisdiction over a claim under [§ 1367(a)] if . . . the district court has dismissed all claims over which it has original jurisdiction[.]"). Accordingly, the Plaintiffs› claims against Detective Norton for Assault/Battery and Wrongful Death are dismissed.

Appendix B

IV. ORDER

For the foregoing reasons, the court ORDERS as follows:

1. Vernal City Detective Vance Norton's Motion for Summary Judgment (Docket No. 270) is GRANTED.

2. Uintah County Deputy Anthoney Byron Motion for Summary Judgment (Docket No. 269) is GRANTED.

3. Uintah County Deputies Bevan Watkins' and Troy Slaugh's Joint Motion for Summary Judgment (Docket No. 266) is GRANTED.

4. Uintah County and Vernal City's Joint Motion for Summary Judgment (Docket No. 271) is GRANTED.

5. State Trooper Craig Young's Motion for Summary Judgment (Docket No. 275) is GRANTED.

6. State Trooper Dave Swenson's Motion for Summary Judgment (Docket No. 276) is GRANTED.

7. State Trooper Jeff Chugg, State Trooper Rex Olsen, and DWR Officer Sean Davis's Joint Motion for Summary Judgment (Docket No. 277) is GRANTED.

8. Plaintiffs' motion for partial summary judgment on the First, Third, and Fifth Causes of action (Docket No. 273) is DENIED.

9. Plaintiffs' Motion to Determine Daubert Issues and Request for Hearing to Exclude the Expert Testimony of Nicholas Roberts (Docket No. 260) is DENIED AS MOOT.

10. Plaintiffs' Motion to Determine Daubert Issues and Request for Hearing to Exclude the Expert Testimony of Rudi Riet (Docket No. 261) is DENIED AS MOOT.

11. Plaintiffs' Motion for Summary Judgment re: Indian Country Status of Lands (Docket No. 263) is DENIED AS MOOT.

12. Defendants' Motions to Strike (Docket Nos. 314 and 315) the Plaintiffs' Motion for Summary Judgment re: Indian Country Status of Lands are DENIED AS MOOT.

13. Plaintiffs' Motion to Supplement the Record (Docket No. 407) and Plaintiffs' Amended Motion for Record Supplementation (Docket No. 408) are GRANTED IN PART AND DENIED IN PART.

DATED this 7th day of March, 2014.

BY THE COURT:

/s/_____
TENA CAMPBELL
U.S. District Court Judge

APPENDIX C — ORDER AND MEMORANDUM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION, FILED MARCH 7, 2014

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:09-CV-730-TC

DEBRA JONES AND ARDEN C. POST, INDIVIDUALLY AND AS THE NATURAL PARENTS OF TODD R. MURRAY; AND DEBRA JONES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TODD R. MURRAY, FOR AND ON BEHALF OF THE HEIRS OF TODD. R. MURRAY,

Plaintiffs,

vs.

VANCE NORTON, VERNAL CITY POLICE OFFICER IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; *et al*.,

Defendants.

March 7, 2014, Decided
March 7, 2014, Filed

ORDER AND MEMORANDUM DECISION

Appendix C

Plaintiffs have moved for default judgment on claims 1, 3, 5, 7, 9, 10, 11 and 12 of the Third Amended Complaint contending that Defendants intentionally mishandled, destroyed and lost critical evidence. Alternatively, if default judgment is not entered, Plaintiffs seek lesser sanctions including exclusion of certain items of evidence, an award of fines, and attorney fees and costs. On June 6, 2013, the court held an evidentiary hearing on Plaintiffs' motion.

Because the court finds that none of the named Defendants had a duty to preserve the evidence Plaintiffs claim was intentionally destroyed or mishandled, Plaintiffs' motion for default judgment (Docket No. 258) against all Defendants is DENIED. The court also finds that lesser spoliation sanctions are not appropriate and will not be imposed on Defendants Vance Norton, Dave Swenson, Craig Young, Rex Olsen, Jeff Chugg, Anthoney Byron, Bevan Watkins, Troy Slaugh, Sean Davis, and Uintah County. Plaintiffs' motion for lesser spoliation sanctions (Docket No. 258) against these Defendants is also DENIED.

Plaintiffs' motion for lesser spoliation sanctions against Defendant Vernal City is taken under advisement. Plaintiffs may file a supplemental memorandum within three weeks of the date of this order explaining why Vernal City should be found liable for spoliation sanctions for the failure to test Mr. Murray's firearm before its destruction, the failure to test Detective Norton's firearm, and the failure to swab and test Detective Norton's hands and clothing. Defendant Vernal City may file an opposition

brief three weeks after having received Plaintiffs' memorandum. Plaintiffs' reply, if any, is due ten days after receiving Vernal City's opposition.

I. FACTUAL BACKGROUND

This order is one of two orders issued by the court in this case today. In the order on multiple cross motions for summary judgment, the court has provided a full factual background of this case. The court will include other facts necessary to explain the court's decision in this order.

II. ANALYSIS

Spoliation sanctions are appropriate when "(1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence." *Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 1149 (10th Cir. 2009) (quoting *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007)). If spoliation has occurred, a court may impose a variety of sanctions including dismissal, judgment by default, preclusion of evidence, imposition of an adverse inference, or assessment of attorney's fees and costs. *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 506 (D. Md. 2009) (citing *In re NTL, Inc. Secs. Litig.*, 244 F.R.D. 179, 191 (S.D.N.Y. 2007)).

In deciding whether the court should order dismissal or default, it also considers other factors, including: (1) the degree of actual prejudice to the party seeking sanctions;

(2) the amount of interference with the judicial process; (3) the culpability of the litigant, (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance, and (5) the efficacy of lesser sanctions. *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992) (internal citations omitted). These factors do not constitute a rigid test, "rather, they represent criteria for the district court to consider prior to imposing dismissal as a sanction." *Id.*

A dismissal or entry of default order should be predicated on "'willfulness, bad faith, or [some] fault.'" *Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1321 (10th Cir. 2011) (quoting *Archibeque v. Atchinson, Topeka & Santa Fe Ry.*, 70 F.3d 1172, 1174 (10th Cir. 1995)). Mere negligence in destroying or losing records "is not enough because it does not support an inference of consciousness of a weak case." *Turner*, 563 F.3d at 1149 (quoting *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997)). Without a showing of bad faith, a court may only consider imposing lesser sanctions. *Id.* (citing *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1220 (10th Cir. 2008)).

Plaintiffs recite a long list of acts and failures to act that they contend "irreparably impaired the Plaintiffs' ability not only to prove the elements of their claims, but to refute the Defendants' asserted defenses." (Pls.' Mot. Mem. Supp. Default J. (Docket No. 258) at vi-xvi.) Because Plaintiffs do not identify which Defendants are responsible for specific acts of alleged spoliation but rather group them together as "Defendants," and because all of the alleged misdeeds Plaintiffs point to

occurred before this lawsuit was filed, the court must answer two preliminary questions: First, which Defendant or Defendants had a duty to preserve the particular piece of evidence that Plaintiffs claim was destroyed or mishandled? Second, should the responsible Defendant or Defendants have known or reasonably foreseen that litigation was imminent?

Plaintiffs give an eleven-page description of what they claim was Defendants' "tampering with and destruction of evidence." (Pls.' Mot. Mem. Supp. Default J. (Docket No. 258) at vi.) They divide their claims into several sections and subsections. The court will follow Plaintiffs' grouping of their claims.

A. THE SCENE OF THE SHOOTING

1. Rendering Aid

Plaintiffs argue that had Mr. Murray received medical help, he might have survived and could give his account of what happened. In the Plaintiffs' reply to the Defendants' response to the motion for default, they state: "It goes without saying, that had the officers simply attempted to stop the bleeding . . . Murray may have survived to give a recitation of facts fully supportive of the Plaintiffs[']cause of action." (Pls.' Reply to Mot. Mem. Supp. Default J. (Docket No. 317) at i.)

Plaintiffs are correct that none of the law enforcement officers who were present at the scene attempted to give aid to Mr. Murray during the approximately thirty minutes he

lay bleeding on the ground before the ambulance arrived. But this fact, troubling as it is, is not a basis for spoliation sanctions. Despite what Plaintiffs allege "goes without saying," (Pls.' Mot. Mem. Supp. Default J. (Docket No. 258) at 10), Plaintiffs have not shown that they were prejudiced by the failure of the officers to act because they have not submitted evidence in support of their contention. In fact, the record evidence shows otherwise.

Dr. Edward A. Leis, the Deputy Chief Medical Examiner who did the examination of Mr. Murray's body, testified at the June 6, 2013 Evidentiary Hearing,[1] that in his opinion, the wound Mr. Murray received was "an un-survivable injury." (Evidentiary Hr'g Tr. 71, June 6, 2013.) Plaintiffs have presented no evidence to rebut Dr. Leis' opinion. Without evidence showing that Mr. Murray could have survived, the court will not impose sanctions on the Defendants for not rendering aid to Mr. Murray.

2. The .380 Firearm[2]

Because the shooting took place on the Uintah and Ouray Indian Reservation (the Reservation), the F.B.I. had jurisdiction over the investigation.[3] On the morning of the incident, Special Agent Rex Ashdown went to the

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1. Reference to the June 6, 2013 Spoliation Hearing will be cited as "(Evidentiary Hr'g Tr. , June 6, 2013.)," "(Hr'g Tr. .)," and "(*Id,* .)"

2. Photographs from the scene show the firearm. (*See* Hr'g Ex. 5U.)

3. No one from the federal government has been named as a Defendant.

scene of the shooting. He arrived after the ambulance had taken Mr. Murray to the hospital. Soon after he had arrived, Agent Ashdown was told that Mr. Murray had shot himself. Mr. Ashdown admitted at the June 6 Hearing that this information had "some influence" on how he carried out his investigation of the shooting. (*Id.* 122.)

The .380 was found close to where Mr. Murray was lying. Agent Ashdown made the decision about what tests to do, or not do, on the firearm. He alone chose to have no tests done on the firearm, including ballistics tests and tests for fingerprints. (*See id.* 132, 135-36.) Agent Ashdown testified that he took a photograph (Evidentiary Hr'g Ex. 5U, June 6, 2013) of the gun, which showed the firearm with a "stove pipe jammed shell casing," that is, a shell that had been fired but was not ejected from the firearm, Agent Ashdown chose not to have a test fire done on the firearm. (Hr'g Tr. 135.) He explained:

> Mr. Ashdown: There was no reason to request a test fire on it. We had — the only purpose — the only thing that would have been proved by the test firing is if the gun functions.
>
> Court: How about whether it had been fired? Could you have told that from the test when the gun had been fired?
>
> Mr. Ashdown: That could have been determined that it had been fired but it was already obvious that the gun had been fired.

> Court: Why was it obvious that it had been fired?
>
> Mr. Ashdown: There were two spent shell casings on the ground, plus a spent shell casing inside of the gun that had been fired and not totally ejected.
>
> Court: Tell me, so there were two spent shell casings, and they were quite near the gun, is that right? They were near the gun?
>
> Mr. Ashdown: Within a radius that would be expected with the ejection system of the gun.
>
> Court: Were you able to definitively determine that those spent shell casings came from that gun?
>
> Mr. Ashdown: There were no tests to definitively do that. With the information I had, and what I had seen at the scene, there was no reason to doubt that those were the gun's shell casings from that gun.

(*Id.* 132-33.) Agent Ashdown also decided that he would not have a fingerprint analysis down on Mr. Murray's firearm. "At this point in the investigation, everything had been consistent with what I had been informed and what I had seen. I knew that Mr. Murray had had that gun in his possession." (*Id.* 136.)

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Agent Ashdown did not discuss his decisions or reasons for not having tests done on the firearm with any of the Defendants. After leaving the scene, Agent Ashdown placed the firearm in evidence at the F.B.I. office in Vernal, Utah.

Agent Ashdown retired from the F.B.I. on May 31, 2007. Not long after the shooting but before Agent Ashdown's retirement, members of Mr. Murray's family met with him at his office. Agent Ashdown described the family as "upset about their son's death and maybe believed something else happened." (Hr'g Tr. 186.)

After Agent Ashdown retired, Special Agent David Ryan replaced him. He did not order tests on the firearm because, he testified, "That part of the investigation was handled by Agent Ashdown. And so no, I did not second guess that part of the investigation." (*Id.* 193.) Agent Ryan focused his investigation on the purchase of the firearm. He found that the purchase of the firearm was a "straw purchase," that is, as Agent Ryan explained, "an illegal purchase that was provided to a restricted person." (*Id.* 193.) After the completion of the federal criminal matter involving the firearm,[4] the judge hearing the case signed, on November 14, 2008, an order forfeiting the firearm to the government. Shortly thereafter, the firearm was destroyed. Agent Ryan did not notify any of the Defendants that the firearm would be destroyed.

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4. The purchaser pled guilty in federal court to a charge of making a false statement in connection with the purchase of the firearm.

Appendix C

On March 28, 2008, several months before the firearm was destroyed, the Plaintiffs sent a Notice of Claim (Notice) to the Vernal City Police Department, the Utah Highway Patrol, the Uintah County Sheriff, Uintah County and Detective Norton. The first paragraph of the Notice reads:

> **Please Take Notice That:**
>
> Pursuant to Utah Code Ann. §63-30d-401, the Claimant, Debra Jones, on behalf of the estate of her son, Todd Rory Murray, deceased, hereby files written notice of her claims against the Vernal City Police Department, Detective Vance Norton, individually, and in his capacity as a Vernal City Police Officer, Vernal City, the State of Utah, the Utah Highway Patrol, a division of the Utah Department of Public Safety, Uintah County, the Uintah County Sheriff's Office, and John Does 1-10. This notice should not be deemed to waive any cause of action that Debra Jones may have against any individual or entity, governmental or otherwise, who may later be determined to be ultimately responsible for the damages she has sustained.

(Notice of Claim, Ex. K to Pls.' Mot. Mem. Supp. Default J. (Docket No. 258-12) at 3.)

The Notice provides a summary of the events that occurred on April 1, 2007, beginning with the police pursuit and ending with the medical examiner's examination and

"autopsy"[5] of Mr. Murray's body. The Notice then lists the claims that Plaintiffs intended to bring:

> The nature of the claims asserted herein is premised upon the use of excessive and unreasonable police force. Claimant intends to seek a judicial remedy for the above misconduct and constitutional violations. Specifically, claimant intends to file suit and will include the following claims:
>
> • Violations of 42 U.S.C. § 1983.
>
> • Deprivation of Claimants' rights under the Fourth Amendment and Fourteenth Amendment to the Constitution of the United States and Article I Section 14 of the Utah Constitution to be free of unreasonable search and seizure.
>
> • Deprivation of Claimants' rights under the Fourteenth Amendment to the Constitution of the United States and Article 1 Sections 2 and 7 of the Utah Constitution not to be deprived of life, liberty or property without due process of law, and the right to equal protection of the laws.
>
> • Deprivation of Claimants' rights under the Fifth Amendment to the Constitution of the United States

5. The Notice describes this as an "autopsy" undoubtedly because the Plaintiffs were unaware that Dr. Leis had decided only to perform a physical examination.

not to be deprived of life, liberty or property without due process of law, and not to be compelled in any criminal case to be a witness against himself.

- Assault and battery.

- Intentional and/or negligent infliction of emotional distress, extreme and outrageous conduct.

- Negligence.

- Wrongful death.

(Notice of Claim, Ex. K to Pls.' Mot. Mem. Supp. Default J. (Docket No. 258-12) at 6-7.)

Even after the Notice was sent, no one contacted the F.B.I. about the firearm although, as Agent Ryan testified, he believed "everyone knew" that the F.B.I. had the firearm and if any of the law enforcement agencies had contacted him and requested that tests be done on the firearm, he "possibly" would have agreed. (Hr'g Tr. 198.)

Plaintiffs contend that because the firearm was not forensically tested before it was destroyed they have been prejudiced because they "will never be able to determine":

a. If it was an operable firearm;

b. If it contained blowback (blood/tissue) which would have been present if the gun had been pressed up against Murray's head when it was fired;

c. If it fired the shell casings that were found at Murray's feet; and

d. If it contained fingerprints.

(Pls.' Mot. Mem. Supp. Default J. (Docket No. 258) at vii-viii.)

Which Defendant or Defendants had a duty to preserve the .380 firearm and could have reasonably foreseen that litigation was imminent

Defendants Dave Swenson, Craig Young, Rex Olsen and Jeff Chugg were Utah Highway Patrol Troopers. Sean Davis was an Investigator with the Utah Department of Natural Resources, Division of Wildlife Resources. None of these Defendants (the State Defendants) was involved in the actual shooting.[6] None of the State Defendants took possession or had control of the firearm during the investigation. They were not notified that the firearm was to be destroyed. The Notice was not sent to any of the State Defendants individually and there is no evidence that they knew of it. For these reasons, the State Defendants had no duty to preserve the firearm because they did not know, and did not have reason to know, that the firearm would be relevant to any litigation brought against them. Accordingly, the State Defendants cannot be liable for the gun's destruction.

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6. Today, the court has issued a separate order that describes the actions of the various Defendants.

Appendix C

Defendants Bevan Watkins, Troy Slaugh and Anthoney Byron (Uintah County Defendants) were deputies with the Uintah County Sheriff's Office. Similar to the State Defendants, the Uintah County Defendants were not involved in the actual shooting; they did not take possession or have control of the firearm; they were not notified that the firearm was to be destroyed; and they were not sent the Notice and no evidence in the record shows they knew of the Notice. Without notice, the Uintah County Defendants did not have a duty to preserve the firearm and could not have reasonably foreseen that they would be subject to any claims involving the firearm. For these reasons, the court will not find the Uintah County Defendants liable. And because the individual Uintah County Defendants are not liable for the destruction of the firearm, their agency, Uintah County, will not be held liable.

Detective Norton and his agency, Vernal City, have also been named as Defendants. Detective Norton was involved in the shooting in which Mr. Murray died. By his own admission, Detective Norton fired two shots at Mr. Murray. Unlike the State and Uintah County Defendants, Detective Norton received the Notice on April 1, 2008. (Hr'g Tr. 242.) He testified that when he received it, he was unaware of any claim that he had shot Mr. Murray and believed that the sole issue was about jurisdiction. When he received the Notice, Detective Norton took it to the Vernal City Attorney, Dennis Judd, and asked him what should be done. There is nothing in the record about what advice Mr. Judd gave Detective Norton.

Although Detective Norton knew that litigation was imminent and he was involved in the shooting, the court finds that he should not be sanctioned for failing to have the firearm tested and failing to stop the F.B.I.'s destruction of the firearm. Agent Ashdown testified that he did not discuss what testing would be done on the firearm with any of the Defendants, although if any of the other agencies involved had requested that certain tests be performed, he would have had the tests done as "a courtesy." (Hr'g Tr. 171.) And Agent Ryan did not notify any of the Defendants that the firearm was to be destroyed. Therefore, when he received the Notice, Detective Norton did not know that the F.B.I. had performed no tests on the firearm and he did not know that it would soon be destroyed. He also sought advice from an attorney about what actions he took. In light of all the above circumstances, there was no culpability or even negligence on the part of Detective Norton and the court will not impose sanctions on him.

The court cannot determine whether sanctions should be imposed on Defendant Vernal City for failing to test Mr. Murray's firearm before its destruction because the Plaintiffs have not specifically identified what theory of liability, if any, would apply. If Plaintiffs wish to file a memorandum on the issue of Vernal City's liability for spoliation sanctions for the failure to test and the destruction of the firearm, they may do so within three weeks of the date of this order. Defendant Vernal City may file an opposition brief three weeks after having received Plaintiffs' memorandum. Plaintiffs' reply, if any, is due ten days after receiving Vernal City's opposition.

3. Detective Norton's Firearm

After the shooting, Gary Jensen, who was the Vernal City chief of police, took Detective Norton's firearm after the shooting. He kept it for several days before returning it to Detective Norton. Chief Jensen visually examined the firearm and, at the June 6 Hearing, described it as in "pristine condition." (Hr'g Tr. 216.) He had no tests performed on the firearm and did no additional examination.

Plaintiffs argue that the failure to test or forensically examine Detective Norton's firearm has prejudiced them because they will never be able to determine:

a. If it contained blowback (blood/tissue) which would have been present if the gun had been pressed up against Murray's head when it was fired;

b. If it fired the shell casings found where Norton claimed he fired back; and

c. If it contained fingerprints.

(Pls.' Mot. Mem. Supp. Default J. (Docket No. 258) at viii-ix.)

The court agrees with the Plaintiffs' argument that Chief Jensen's visual examination was not sufficient and that Plaintiffs have possibly been prejudiced by the lack of evidence that testing might have uncovered. But the

court must decide which Defendant or Defendants should be held liable.

Which Defendant or Defendants had a duty to preserve the evidence from Detective Norton's firearm and could have reasonably foreseen that litigation was imminent?

The State Defendants and Uintah County Defendants had no responsibility to ensure that Detective Norton's firearm was tested. As discussed above, they were not involved in the shooting. If they were aware at all of what happened to Detective Norton's firearm after the shooting, they would have only seen or known that Chief Jensen had taken it. These Defendants had no reason or obligation to make further inquiry.

As part of his investigation, Agent Ashdown possibly should have taken Detective Norton's firearm to have necessary tests performed. But Agent Ashdown is not a named Defendant.

After the shooting, Detective Norton gave his firearm to Chief Jensen. There is no evidence that he could dictate to his superior officer, Chief Jensen, what to do with the firearm or which tests should be conducted. The court finds that Detective Norton had no further obligation to preserve evidence from his firearm and he will not be held liable for spoliation sanctions regarding his firearm.

Vernal City's failure to fully examine Detective Norton's firearm occurred before the Notice was sent

and before litigation began. But in light of the seriousness of the incident and the involvement of officers on the Reservation where they did not have jurisdiction, litigation could reasonably be expected. But the court cannot presently determine whether sanctions should be imposed on Defendant Vernal City because the Plaintiffs have not specifically identified what theory of liability, if any, would apply. Similarly, as noted above, if the Plaintiffs wish to submit a memorandum on the issue of Vernal City's liability for spoliation sanctions for the failure to test Detective Norton's firearm, they may do so in accordance with the briefing schedule described above. Defendants may respond following that same schedule.

4. Critical Evidence

According to Plaintiffs, Defendants failed to preserve other critical evidence. Specifically, Plaintiffs allege that:

a. Defendants failed to swab Mr. Murray's and Detective Norton's hands for gun shot residue;

b. Defendants failed to forensically examine Mr. Murray's and Detective Norton's clothing for the presence of blood or tissue;

c. Defendants inadequately documented the scene by failing to search for all fired bullets and performed an unsatisfactory blood splatter analysis, and in doing so, eliminated the Plaintiffs' opportunity to reconstruct or verify the scene as portrayed by Defendants; and

d. Defendants did not conduct a search of Detective Norton's person and did not search, process, or photograph Detective Norton's vehicle.

(*See* Pls.' Mot. Mem. Supp. Default J. (Docket No. 258) at ix-x.)

a. Failure to Test and Swab Mr. Murray's and Detective Norton's Hands and Clothing

Dr. Edward Leis, the Deputy Chief Medical Examiner who conducted the examination, did not test Mr. Murray's clothing or swab his hands. He testified that his office did not typically do any testing on clothing other than visually inspect it. He also testified that if an agency requested additional testing, the clothing would be sent to that agency for testing. Dr. Leis stated that the F.B.I. requested an examination of Mr. Murray's body, but did not request that any additional testing be done to the clothing.

Dr. Leis explained that he did not have Mr. Murray's hands swabbed and tested because Mr. Murray's death was reported to him as a suicide.[7] He testified in his deposition that had an agency requested, he would have swabbed the hands and given the swab to the agency. The agent in charge of the investigation, Agent Ashdown, did not order a gunshot residue test on Mr. Murray's hands because the F.B.I. had stopped doing the tests long before

7. Dr. Leis testified in his deposition that his crime lab stopped routinely doing gunshot residue examinations in the 1990s. (Leis Dep. 46.)

this investigation as "they were inherently unreliable." (Hr'g Tr. 142.)

Detective Norton admitted that he twice fired his firearm, so testing his hands for gun shot residue would only confirm this. Moreover, Detective Norton could not be expected to swab his own hands or test his own clothing. Therefore he is not liable for spoliation sanctions for failure to test his own firearm and his clothing.

Since an officer from the Vernal Police Department, Detective Norton, was involved in the shooting, it appears that Chief Jensen had taken the responsibility to collect certain evidence, such as Detective Norton's firearm. Perhaps Chief Jensen should have collected Detective Norton's clothing and swabbed Detective Norton's hands to test for the presence of blowback or tissue. But Chief Jensen is not a named Defendant. Vernal City could potentially be liable for Chief Jensen's failure to swab Detective Norton's hands and examine his clothing, but the Plaintiffs have not shown what theory of liability should apply.

None of the named Defendants can be held liable for these alleged misdeeds, because Agent Ashdown and Keith Campbell [8] were in charge of the investigation. None of the Defendants in this case, except possibly Vernal City,

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8. Officer Campbell was an "undersheriff or chief deputy for the Uintah Sheriff's office" and a deputy medical examiner for the Office of the Medical Examiner. (Campbell Dep. 10.) During this investigation, Officer Campbell testified that he was acting in his role as deputy medical examiner. (Id. at 9.)

had a duty to swab Detective Norton's hands or examine his clothing. Because of this, the court will not find the State Defendants or the Uintah County Defendants liable.

If Plaintiffs want to file a memorandum explaining why Vernal City should be held liable for failing to test Detective Norton's hands and clothing, they may do so in accordance with the briefing schedule described above. Defendants may respond following that same schedule.

b. Inadequate Scene Documentation, Failure to Search for Fired Bullets, and Inadequate Documentation of Blood Splatter

Agent Ashdown and Officer Campbell were in charge of documenting the physical evidence for the investigation. Agent Ashdown led the F.B.I.'s investigation and Deputy Campbell was acting in his role as deputy medical examiner for the Utah State Office of the Medical Examiner. None of the named Defendants had the responsibility or duty to investigate and document the actual scene of the shooting (although certain Defendants, including Detective Norton, took photographs of the scene). Because none of the Defendants had a duty to document the scene, search for fired bullets, or document blood splatter, the court will not impose sanctions on any of the Defendants.

c. Failure to Search Detective Norton or His Automobile

Plaintiffs do not explain what relevant evidence was lost because Detective Norton and his vehicle were not

searched. And there is no evidence that Plaintiffs were "actually, rather than merely theoretically" prejudiced by this omission. *See Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032-33 (10th Cir. 2007). Because Plaintiffs have not met their burden, and have only alleged that it is possible that relevant evidence was lost when these searches were not performed, the court will not impose sanctions on the Defendants.

B. MURRAY'S BODY

1. Ashley Valley Medical Center

Plaintiffs argue that the Defendants destroyed or lost relevant evidence that could have been found on Mr. Murray's body while he was in the emergency room at Ashley Valley Medical Center and, later, at Blackburn Mortuary. Specifically, they allege:

a. Murray's body was compromised during photographs by the manipulation of the wound by Defendants. Specifically, Defendant Anthoney Byron inserted a finger into Mr. Murray's gunshot wound and such manipulation could have affected the bullet trajectory determination;

b. Defendants improperly disrobed Mr. Murray in the ER, resulting in the possible destruction of trace evidence; and

c. Defendants destroyed or failed to prepare chain of custody documents for the extraction of a blood sample taken in the ER.

(*See* Pls.' Mot. Mem. Supp. Default J. (Docket No. 258) at xi-xii.)

Plaintiffs are correct that Defendant Anthoney Byron inserted his finger in one of the wounds in Mr. Murray's head, Dr. Leis testified that this did not change his conclusion that Mr. Murray had taken his own life. (Hr'g Tr. 58-59.)

Ben Murray, who was then a detective with the Vernal City Police Department, was the person who decided to remove Mr. Murray's clothes so he could photograph all the injuries on Mr. Murray's body. (Murray Dep. 71.) But Mr. Murray is not a named Defendant.

The fact that blood was taken in the emergency room and no chain of custody was kept does not prejudice Plaintiffs because blood was also taken from Mr. Murray's body at the medical examiner's office. This blood was properly documented and tested by the medical examiner. Only the blood drawn by the medical examiner was used to determine the drug and alcohol levels in Mr. Murray's blood. Because of this, Plaintiffs' claim that Defendants' destruction or failure to maintain chain of custody over the blood they extracted in the ER fails.

2. Blackburn Mortuary

Plaintiffs also claim that Defendants "improperly handled and tampered with" Mr. Murray's body at Blackburn Mortuary. Plaintiffs allege that:

a. Vernal City Police Chief Gary Jensen's attempt to draw blood from Mr. Murray's heart at the mortuary and his direction to a mortuary employee to make an incision in Mr. Murray's jugular vein to draw blood "obviously contaminated [Mr.] Murray's body and, consequently, invalidated the toxicology results;

b. Defendants destroyed or did not prepare chain of custody documents for the evidence that was or should have been obtained at the mortuary because: "1) no photographs were taken; 2) there is no evidence [Mr.] Murray was placed in a sealed body bag; 3) no evidence log was made; [and] 4) no personnel log was compiled;" and

c. Defendants destroyed or did not prepare chain of custody documents for the extracted blood sample taken at Blackburn Mortuary, "making it impossible for Plaintiffs to determine if the sample was properly preserved."

(*See* Pls.' Mot. Mem. Supp. Default J. (Docket No. 258) at xi-xii.)

Plaintiffs suffered no prejudice from Chief Jensen's drawing of blood from Mr. Murray's body and failure to establish chain of custody because, as discussed above, blood was taken and the blood draw was documented at the office of the medical examiner with the results used in the medical examiner's final report. Similarly, Plaintiffs have not shown how they were prejudiced by the fact that

no photographs were taken at the mortuary, no evidence log was made, and no personnel log was compiled. And, as will be discussed later in this order, there is no evidence showing when Mr. Murray's body was placed in a body bag.

Even if the court concluded that these acts prejudiced the Plaintiffs, the Plaintiffs have failed to allege which Defendant or Defendants had a duty to take photos at the mortuary, place Mr. Murray's body into a sealed body bag, or create a log. Plaintiffs' blanket claim that all Defendants had these duties does not persuade the court and does not meet the necessary requirements for the court to impose sanctions.

3. Office of the Medical Examiner

Plaintiffs contend that because a full autopsy was not done on Mr. Murray's body, they were prejudiced. Specifically, Plaintiffs allege that, "[Mr.] Murray's body was improperly handled by the [Office of the Medical Examiner] because the [Office of the Medical Examiner] failed to perform a full forensic autopsy as statutorily mandated under UTAH CODE ANN. § 26-4-13(1)." (*See* Pls.' Mot. Mem. Supp. Default J. (Docket No. 258) at xiii.) And Plaintiffs allege that the Defendants themselves failed to do more than an external examination of Mr. Murray's body.

Though Agent Ashdown requested an autopsy of Mr. Murray, Dr. Leis decided that an autopsy was not necessary and did not perform one. Dr. Leis is not a Defendant and, as he testified, he alone made the decision

not to do an autopsy based on "[t]he physical findings, the lack of any indication that there was any type of struggle, the contact gunshot wound, the relative position between the two individuals." (Hr'g Tr. 88.) None of the Defendants bear any responsibility for Dr. Leis' decision not to perform an autopsy.

4. Trace Evidence

Plaintiffs argue that critical evidence was lost because Mr. Murray's hands were not bagged properly and Mr. Murray's body was not properly preserved because the body bag was incorrectly sealed. Nothing in the record shows when Mr. Murray was placed in a body bag or who placed him in the body bag.

There is no evidence to show that Mr. Murray's hands were bagged improperly. Plaintiffs argue that Mr. Murray's hands must have been improperly bagged because some photographs showed his hands bagged and others did not, but there is no evidence to show who, when, and where Mr. Murray's hands were bagged, or when the bags were removed. And there is no evidence to show that the body bag was sealed. Similarly, there is no evidence on the record to show that it wasn't sealed. Even if Plaintiffs showed how this lack of documentation caused them prejudice, the court cannot find any Defendant liable because Plaintiffs have not identified which Defendant or Defendants would be responsible for this alleged spoliation.

III. CONCLUSION

Because Plaintiffs have failed to established that spoliation sanctions are appropriate against the named Defendants, Plaintiffs are not entitled to an entry of default against any of the Defendants. Plaintiffs' motion for default (Docket No. 258) is DENIED.

Similarly, Plaintiffs' motion for spoliation sanctions against Defendants Vance Norton, Dave Swenson, Craig Young, Rex Olsen, Jeff Chugg, Anthoney Byron, Bevan Watkins, Troy Slaugh, Sean Davis, and Uintah County (Docket No. 258) is DENIED.

The court takes the motion for lesser sanctions against Vernal City (Docket No. 258) under advisement pending additional briefing as set forth in this order.

SO ORDERED this 7th day of March 2014.

BY THE COURT:

/s/_____
TENA CAMPBELL
U.S. District Court Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION, FILED MARCH 7, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:09-CV-730-TC

DEBRA JONES AND ARDEN C. POST, INDIVIDUALLY AND AS THE NATURAL PARENTS OF TODD R. MURRAY; AND DEBRA JONES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TODD R. MURRAY, FOR AND ON BEHALF OF THE HEIRS OF TODD. R. MURRAY,

Plaintiffs,

vs.

VANCE NORTON, VERNAL CITY POLICE OFFICER IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; *et al*., VANCE NORTON, *et al*.,

Defendants.

ORDER

Plaintiffs filed a Motion for Reconsideration (Docket No. 411) of the court's July 26, 2010 ruling on the Utah Governmental Immunity Act (UGIA). Plaintiffs also filed a

Motion for Certification for Interlocutory Appeal (Docket No. 412) of the court's July 26, 2010 decision. The court's July 26, 2010 Order (Docket No. 73) was not a final order. It addressed whether the UGIA barred Plaintiffs' state law claims because Mr. Murray's death arose from an assault or battery. Plaintiffs argue that the UGIA does not apply because Defendants' immunity was waived because actions taken against Mr. Murray were intentional, and because the events took place outside the jurisdictional boundaries of Utah. 28 U.S.C. 1292(b) authorizes the district court to certify an interlocutory appeal to the court of appeals if the appeal involves a "controlling question of law as to which there is substantial ground for difference of opinion and [if] an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The court has reviewed the parties' pleadings and the court's July 26, 2010 order. The court finds that the Plaintiffs' argument for reconsideration of the court's order on the UGIA is without merit. And based on the other orders the court has issued today denying Plaintiffs' Motion for Spoliation Sanctions and granting Defendants' Motions for Summary Judgment, an immediate appeal from the July 26, 2010 order will not materially advance the termination of the litigation. Accordingly, Plaintiffs' Motion for Reconsideration (Docket No. 411) is DENIED and the Motion to Certify (Docket No. 412) is DENIED AS MOOT.

SO ORDERED this 7th day of March 2014.

Appendix D

BY THE COURT:

/s/_____
TENA CAMPBELL
U.S. District Court Judge

APPENDIX E — ORDER AND MEMORANDUM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION, FILED MARCH 29, 2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

No. 2:09-cv-730

DEBRA JONES, *et al.*,

Plaintiffs,

vs.

VANCE NORTON, *et al.*,

Defendants.

March 28, 2013, Decided; March 29, 2013, Filed

Judge Tena Campbell

ORDER AND MEMORANDUM DECISION

I. INTRODUCTION

Mr. Todd R. Murray, a member of the Ute Indian Tribe, died of a gunshot wound while within the boundaries of the Uintah and Ouray Indian Reservation. The gunshot wound was the final event in a lengthy police chase conducted by various state, county, and city

agencies. Plaintiffs—comprising Mr. Murray's estate and his biological parents—brought suit alleging a number of violations under federal and state law. In Plaintiffs' Eighth Cause of Action, they contend that the pursuit of Mr. Murray and his subsequent death were violations of the Ute Treaty of 1868 (Ute Treaty), and that those violations are actionable under 42 U.S.C. § 1983 (2012).

There are a number of Defendants, one group of which includes Vance Norton, Anthoney Byron, Bevan Watkins, Troy Slaugh, Vernal City, and Uintah County, Utah (Vernal/Uintah Defendants). The Vernal/Uintah Defendants have moved for judgment on the pleadings on the Plaintiffs' Eighth Cause of Action (Docket No. 240), arguing that Mr. Murray's rights under the Ute Treaty cannot be vindicated by § 1983. For the reasons set forth below, the court agrees with the Vernal/Uintah Defendants, and HEREBY dismisses with prejudice Plaintiffs' Eighth Cause of Action.

II. ANALYSIS

Section 1983 gives a civil remedy to persons who have been deprived of any federal or constitutional right, privilege, or immunity by a government actor. *See* 42 U.S.C. § 1983 (2012). Section 1983 is not itself the source of rights; instead § 1983 provides a method for the vindication of rights conferred elsewhere in the United States Constitution or federal laws. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-85, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002). Therefore, in order to bring a viable claim under § 1983, Plaintiffs must show Mr. Murray was

deprived of a right secured by the Constitution or by federal law. *See id.* at 284-85.

That analysis proceeds in two steps: first, Plaintiffs must show that the Ute Treaty is considered binding federal law; and second, Plaintiffs must show that the Ute Treaty secures a personal right that entitles Mr. Murray to a private remedy against the Vernal/Uintah Defendants. *See Jogi v. Voges*, 480 F.3d 822, 827-28 (7th Cir. 2007); *see also* John T. Parry, *A Primer on Treaties and § 1983 after Medellín v. Texas,* 13 Lewis & Clark L. Rev. 35, 70-72 (2009) (summarizing methods used by courts to determine whether treaty rights can be vindicated by a § 1983 action).

Plaintiffs contend that the Ute Treaty is binding federal law because treaties are considered the supreme law of the land. Plaintiffs claim that the so-called "Bad Man" clause of the Ute Treaty gives tribe members a right to be free from harms caused by "bad men among the whites" while on tribal lands. (Pls.' Third Am. Compl. ¶ 130, Docket No. 170.) They argue that the Ute Treaty gave Mr. Murray a personal remedy against the Vernal/Uintah Defendants for the wrongs he suffered, including being pursued and assaulted in a way that led to his wrongful death.

Plaintiffs' are correct in their assertion that the Ute Treaty is a source of binding federal law. Plaintiffs, however, are not correct in assuming that the right they wish to vindicate is secured by the Ute Treaty. Their interpretation conflicts with the plain language

of the treaty and with precedent that has interpreted such language in other cases. The Ute Treaty only secures a right to seek redress from the United States Government—it does not secure a right to be free from the torts of private individuals.

A. The Ute Treaty is a Source of Federal Law

The Supremacy Clause states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." U.S. Const. art. VI, cl. 2. The Supreme Court has noted that although

> [a] treaty is primarily a contract between independent nations. . . . a treaty may also contain provisions which confer rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country."

Edye v. Robertson, 112 U.S. 580, 598, 5 S. Ct. 247, 28 L. Ed. 798, Treas. Dec. 6714 (1884). Depending on the nature of the treaty, its provisions may be considered binding federal law. *See id.* For example, treaties which are "self-executing," or in other words operate "without the aid of any legislative provision," have long been held to be binding as federal law because they are "equivalent to an act of the legislature." *Medellin v. Texas*, 552 U.S. 491, 504-06, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008)

(quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 315, 7 L. Ed. 415 (1829), *overruled on other grounds, United States v. Percheman*, 32 U.S. (7 Pet.) 51, 8 L. Ed. 604 (1833)).

In order to decide whether a treaty is self-executing, courts "may look beyond the written words [of the treaty] to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432, 63 S. Ct. 672, 87 L. Ed. 877, 97 Ct. Cl. 731 (1943) (citations omitted). Moreover, when construing Indian treaties, courts should do so "in the sense in which the Indians understood them and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.'" *Id.* (1943) (quoting *Tulee v. Washington*, 315 U.S. 681, 684, 62 S. Ct. 862, 86 L. Ed. 1115 (1942)).

The "Bad Man" clause in the Ute Treaty appears to be a self-executing agreement between the signatory parties. The Ute Treaty was entered into at a time of tension between westward-expanding frontiersmen and the Native Americans inhabitants. *See* Lillian Marquez, *Making Bad Men Pay: Recovering Pain and Suffering Damages for Torts on Indian Reservations under the Bad Men Clause*, 20 Fed. Cir. B.J. 609, 610-13 (2010-2011). To reduce friction and keep the peace between the Native American nations and the citizens of the United States, the United States negotiated various peace treaties. *Id.* Nine of those treaties—including the Ute Treaty—contained a clause designed to remedy abuses against the Native Americans perpetrated by "bad men among the whites."

See id.; *Brown v. United States*, 32 Ct. Cl. 432, 435-36 (1897). This "Bad Man" clause appears in substantially the same form in each of the nine treaties, *Garreaux v. United States*, 77 Fed. Cl. 726, 735 (2007), and as contained in the Ute Treaty, the clause states:

> If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.

Treaty with the Ute, Mar. 2, 1868, art. 6, 15 Stat. 619, 620 (1868). As stated by the Federal Circuit Court of Appeals, the Bad Man clause was a pact "between two nations, and each one promised redress for wrongs committed by its nationals against those of the other nation." *Richard v. United States*, 677 F.3d 1141, 1148 (Fed. Cir. 2012) (quoting *Tsosie v. United States*, 825 F.2d 393, 400 n.2 (Fed. Cir. 1987)). The plain language of the Ute Treaty indicates that from the moment the treaty was signed, Native Americans could petition the United States for redress from wrongs committed by bad men among the whites. That language, when viewed with the broad presumption courts use when interpreting Indian treaties, indicates that the portion of the Ute Treaty in question was self-executing, and is therefore a source of binding federal law.

B. The Ute Treaty Does not Secure A Right to be Free from the Torts of "Bad Men"

But even if the Ute Treaty is a source of binding federal law, that is not enough to show Plaintiffs may bring a § 1983 claim based on violations of the Ute Treaty. Plaintiffs must also show that a personal right can be inferred from the Ute Treaty, and that Mr. Murray is entitled to a private remedy against the Vernal/Uintah Defendants. *See Jogi v. Voges*, 480 F.3d 822, 827-28 (7th Cir. 2007).

Courts apply a "strict test" to determine whether a statute (or in this case, a treaty) confers an individual right that may be enforced through § 1983. *Id.* at 833; *see Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002). The plaintiff must show (1) that the statute grants private rights to an identifiable class, and (2) that the text of the statute is phrased in terms of the persons benefitted. *Gonzaga*, 536 U.S. at 283-84.

Plaintiffs have not met this test. Although it can be argued the Ute Treaty confers an individual right to bring redress against the United States, it does not confer an individual right to be free from the torts of "bad men among the whites." As noted above, the Bad Man clause was a pact "between two nations, and each one promised redress for wrongs committed by its nationals against those of the other nation." *Richard*, 677 F.3d at 1148 (quoting *Tsosie*, 825 F.2d at 400 n.2). In other words, the Bad Man clause gives Native Americans a right to seek redress directly from the United States for wrongs

that are perpetrated by U.S. citizens against the a tribe member while on tribal land. *See id.* at 1153; *Elk v. United States*, 87 Fed. Cl. 70, 79 (Fed. Cl. 2009) ("[T]he 1868 Treaty's 'bad men' provision created an individual third-party contractual right through which an individual claimant could directly pursue a suit against the United States."). That is not the right asserted by the Plaintiffs. The Ute Treaty does not confer upon tribe members the right to be free from torts; it confers upon them the right to seek redress after the tort has happened—and not from the tortfeasor, but from the United States. As such, the Plaintiffs have failed to carry their burden to show that the Ute Treaty confers upon Mr. Murray a right to be free from the torts they allege were committed upon him by the Uintah/Vernal Defendants.

III. CONCLUSION

For the foregoing reasons, the Bad Man clause of the Ute Treaty does not give Mr. Murray a right that can be vindicated under § 1983. Plaintiffs' Eighth Cause of Action, alleging violations of § 1983 based on the Ute Treaty, is HEREBY dismissed with prejudice.

SO ORDERED this 28th day of March, 2013

BY THE COURT:

/s/ Tena Campbell
TENA CAMPBELL
U.S. District Court Judge

APPENDIX F — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION, FILED JULY 26, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:09-cv-00730-TC-SA

DEBRA JONES, individually and as the natural parent of Todd R. Murray, and as personal representative of the Estate of Todd R. Murray, deceased, for and on behalf of the heirs of Todd R. Murray, and ARDEN C. POST, individually and as the natural parent of Todd R. Murray,

Plaintiffs,

v.

VANCE NORTON, Vernal City police officer, VERNAL CITY, BLACKBURN COMPANY, DAVE SWENSON, in his individual capacity, CRAIG YOUNG, in his individual capacity, REX OLSEN, in his individual capacity, JEFF CHUGG, in his individual capacity, ANTHONEY BYRON, in his individual capacity, BEVAN WATKINS, in his individual capacity, TROY SLAUGH, in his individual capacity, and SEAN DAVIS, in his individual capacity,

Defendants.

Appendix F

July 26, 2010, Decided; July 26, 2010, Filed

Judge Tena Campbell

MEMORANDUM DECISION AND ORDER

The Plaintiffs have filed this lawsuit against various Defendants in connection with the shooting death of Todd R. Mr. Murray which occurred while he was being pursued by police on the Uintah-Ouray Indian Reservation. Defendants Vance Norton and Vernal City move to dismiss the claims against them.

The court holds that Detective Norton did not have jurisdiction to seize Mr. Murray. Because there are disputed issues of fact concerning whether Mr. Murray was seized and whether exigent circumstances justified the seizure if it occurred, the court DENIES Defendants' motion to dismiss the § 1983 claims. But the court holds that the Utah Governmental Immunity Act applies to state law enforcement on Indian reservations and accordingly GRANTS Defendants' motion to dismiss the state law claims.

BACKGROUND[1]

On April 1, 2007, Trooper Dave Swenson, a state trooper with the Utah Highway Patrol was driving on Highway 40 in Uintah County when he saw "two Tribal males," Uriah Kurip and Todd Murray, in a car traveling 74 miles an hour in a 65 mile an hour zone. Mr. Kurip was

1. Because this is a motion to dismiss, all facts are taken from the Second Amended Complaint.

the driver. (Comp.P 23, P 25.) When Mr. Kurip refused to pull over, a high-speed chase began. Mr. Kurip drove onto the Uintah-Ouray Indian Reservation where, after ten miles and twenty minutes of pursuit, Mr. Kurip lost control of the car and skidded off the road. Mr. Kurip and Mr. Murray got out of the car and ran. Trooper Swenson chased Mr. Kurip and caught him.

Detective Vance Norton, a Vernal police detective who heard about the events on his police radio, came to the scene, got out of his car and followed Mr. Murray. When Detective Norton saw Mr. Murray, Detective Norton yelled at him to get on the ground. Detective Norton claims that instead of getting on the ground, Mr. Murray shot at him. In response, Detective Norton fired two rounds at Mr. Murray. According to Detective Norton, Mr. Murray then shot himself in the head. "Other than Detective Norton and [Mr. Murray], there were no eyewitnesses to what actually happened." (*Id.* P 40.)

Plaintiffs allege assault and battery and wrongful death claims against Detective Norton and Vernal City. They also bring various claims under 42 U.S.C. § 1983. Relevant to the pending motions to dismiss are Plaintiffs' claims of unlawful extraterritorial seizure, unlawful use of excessive and deadly force, and unlawful seizure based on lack of reasonable suspicion or probable cause against Detective Vance Norton and extraterritorial seizure, unlawful seizure, and unlawful use of excessive and deadly force based on municipal/supervisory liability against Vernal City.

Appendix F

ANALYSIS

When reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted, the court must presume the truth of all well-pleaded facts in the complaint, but need not consider conclusory allegations. *Tal v. Hogan,* 453 F.3d 1244, 1252 (2006), *cert. denied,* 549 U.S. 1209, 127 S. Ct. 1334, 167 L. Ed. 2d 81 (2007); *Mitchell v. King,* 537 F.2d 385, 386 (10th Cir. 1976). Conclusory allegations are allegations that "do not allege the factual basis" for the claim. *Brown v. Zavaras,* 63 F.3d 967, 972 (10th Cir. 1995). *See also Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir. 1991) ("conclusory allegations *without supporting factual averments* are insufficient to state a claim on which relief can be based") (emphasis added). The court is not bound by a complaint's legal conclusions, deductions and opinions couched as facts. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). And although all reasonable inferences must be drawn in the non-moving party's favor, *Tal,* 453 F.3d at 1252, a complaint will only survive a motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570, *quoted in Ridge at Red Hawk, LLC v. Schneider,* 493 F.3d 1174, 1177 (10th Cir. 2007). Stating a claim under Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Twombly,* 550 U.S. at 555).

The court must first decide whether Plaintiffs have stated a claim for unlawful seizure of Mr. Murray and

then, whether Detective Norton and Vernal City have immunity from suit either due to qualified immunity or under the Utah Governmental Immunity Act. A factor in both questions is that the relevant actions took place on the Uintah and Ouray Indian Reservation where, according to Plaintiffs "only federal and tribal law enforcement officers can exercise law enforcement powers over tribal members inside the Reservation." (*Id.*P 58.)

Seizure

Because Mr. Murray did not obey Detective Norton's commands to stop, Detective Norton did not seize Mr. Murray unless he fired the shot that killed him. "[A] 'seizure' occurs only when a fleeing person is physically touched by police or when he or she submits to a show of authority by police." *Bella v. Chamberlain,* 24 F.3d 1251, 1255 (10th Cir. 1994) (holding that an innocent hostage who was piloting a helicopter that helped inmates escape was not "seized" because he continued to flee even after law enforcement gunfire hit his helicopter). Even if an individual reasonably refused to submit to police authority, a failure to submit means the individual was not seized. *Reeves v. Churchich,* 484 F.3d 1244, 1253 (10th Cir. 2007) (holding that a woman and a girl whose duplex was surrounded by armed law enforcement were not seized because they did not submit to law enforcement authority even though their failure to submit may not have been reasonable).

Paragraphs 37-39 of the Second Amended Complaint contain the allegations about Detective Norton's interaction with Mr. Murray:

> 37. Detective Norton set off on foot and came upon the passenger who was allegedly coming around a hill to the northwest of his location. Detective Norton, who was in street clothes at the time, walked toward the passenger with his gun drawn and pointed toward the passenger, and shouted, "POLICE--GET TO THE GROUND."
>
> 38. Detective Norton allegedly could see something in the passenger's hand but could not tell what it was. Detective Norton allegedly saw the passenger's hand come up and heard the sound of a gunshot. Detective Norton then fired two rounds from his handgun toward the passenger.
>
> 39. Detective Norton alleges that the passenger then turned the gun on himself and pulled the trigger.

(*Id.*P 37-39.)

Plaintiffs argue that there is no physical evidence showing who fired the first shot, so it is impossible to know whether Mr. Murray submitted to Detective Norton's show of force, that is, his order to stop. Plaintiffs contend that the court should draw an inference in favor of Mr. Murray because Vernal City caused the evidence to be lost.[2]

---

2. The gun and ammunition allegedly used by Mr. Murray were lost while under law enforcement control.

Plaintiffs set forth two alternative scenarios: Detective Norton fired the first shot and Mr. Murray returned fire or Mr. Murray shot himself to avoid an illegal arrest. Neither of these actions indicate that Mr. Murray submitted to Detective Norton's show of force.

Assuming that Detective Norton fired the shot that killed Mr. Murray, Detective Norton seized Mr. Murray. But if Mr. Murray shot himself, he was never seized because he never submitted to law enforcement authority. The court must next consider whether the seizure was lawful. In this case, the seizure may have been unlawful because it took place outside Detective Norton's jurisdiction or because it took place without probable cause. The court first addresses the legal issue of whether Detective Norton had the authority to seize Mr. Murray. The court then considers whether Detective Norton had justification to use deadly force.

Extraterritorial Seizure

After reviewing the relevant law, the court concludes that Detective Norton did not have jurisdiction to seize Mr. Murray on the Uintah-Ouray Reservation because the officers were not in hot pursuit of Mr. Murray.

"Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." 18 U.S.C. § 1152. No law gives the state of Utah or its political subdivisions criminal jurisdiction in Indian country. *See Gardner v. United States,* No. 93-4102, 1994

U.S. App. LEXIS 10090 at *10 (10th Cir. May 5, 1994). Although the Uintah-Ouray reservation has a cooperative law enforcement agreement with the state of Utah that allowed cross-deputized officers from Utah to exercise law enforcement authority on the reservation, none of the officers involved in this incident were cross-deputized.

An arrest of a tribal member on tribal land by a state officer is unconstitutional because "[a] warrantless arrest executed outside of the arresting officer's jurisdiction is analogous to a warrantless arrest without probable cause." *Ross. v. Neff,* 905 F.2d 1349, 1354 (10th Cir. 1990) (holding that an Oklahoma police officer did not have jurisdiction to arrest a tribe member on tribe land for violation of Oklahoma's public intoxication ordinance); *see also In re Denetclaw,* 83 Ariz. 299, 320 P.2d 697, 700 (Ariz. 1958) (holding that Arizona traffic law did not apply to roads running through the Indian reservation). "The Supreme Court has expressly stated that state criminal jurisdiction in Indian country is limited to crimes committed 'by non-Indians against non-Indians . . . and victimless crimes by non-Indians.'" *Ross,* 905 F.2d at 1353 (quoting *Solem v. Bartlett,* 465 U.S. 463, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984)).

Defendants argue that under *Nevada v. Hicks,* state sovereignty does not end at a reservation's borders. 533 U.S. 353, 360-61, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001). In *Hicks,* the Supreme Court held that an Indian tribe lacked both "legislative authority to restrict, condition, or otherwise regulate the ability of state officials to investigate off-reservation violations of state law, [and]

lacked adjudicative authority to hear respondent's claim that those officials violated tribal law in the performance of their duty." *Id.* at 374. But that case does not modify the holding in *Ross* because *Hicks* concerned tribal authority rather than the authority of the state. Specifically, *Hicks* held that the tribes cannot interfere with the state concerning areas of the state's jurisdiction: tribe members off the reservation and non-tribe members. Conversely, *Ross* held that the state may not interfere with the self-governance of Indian tribes by arresting tribe members on tribal land for crimes committed on tribal land.

Defendants also argue that the "hot pursuit" exception to the general jurisdictional requirement rendered his pursuit of Mr. Murray lawful. The *Ross* opinion expressly maintained "the Constitutional validity of extrajudicial arrests made by officers in 'hot pursuit.'" *Id.* at 1354 n.6. "Hot pursuit" can justify a warrantless arrest or seizure. *Welsh v. Wisconsin,* 466 U.S. 740, 749-50, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984). "Hot pursuit occurs when an officer is in 'immediate or continuous pursuit' of a suspect from the scene of a crime." *United States v. Jackson,* 139 Fed. Appx. 83, 86 (10th Cir. 2005). Detective Norton argues that the pursuit of Mr. Kruip, who violated the law of Utah by speeding outside the boundaries of the reservation, was justified under the "hot pursuit" doctrine. An arrest is lawful under the hot pursuit doctrine if: (1) a felony was committed *within the arresting officer's jurisdiction;* (2) the subject attempts to flee, or at least knows he is being pursued; (3) pursuit is commenced with no unreasonable delay; (4) pursuit is continuous and uninterrupted; and (5) there is a relationship in time

between the commission of the offense, commencement of pursuit and the apprehension of the suspect. *See State v. Santana,* 427 U.S. 38, 43, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976)."[3]

While the pursuit of Mr. Kruip may be covered under the hot pursuit doctrine because he was the driver, Mr. Murray, the passenger committed no crime off the reservation, so officers were not in hot pursuit of Mr. Murray when they entered the Uintah-Ouray Reservation. Even if the hot pursuit of Mr. Kruip could be extended to cover the seizure of Mr. Murray, officers had no probable cause to believe that Mr. Murray was involved in criminal activity. Detective Norton's only justification for suspecting Mr. Murray came from his flight from Detective Norton which occurred on tribal lands. Flight alone is not sufficient to form probable cause for arrest absent a reasonable belief that the fleeing individual is involved in criminal activity. *State v. Elliott,* 626 P.2d 423, 427 (Utah 1981). While disobeying a lawful order of a law enforcement officer violates Utah Code section 41-6a-209, Mr. Murray was not subject to Utah law at the time the order was given, and therefore the order for him to submit to law enforcement authority was not lawful.

But even though Detective Norton was outside his jurisdiction when he pursued Mr. Murray on the Uintah-Ouray Reservation, Mr. Murray's own actions in displaying

3. Plaintiffs argue that hot or fresh pursuit is Utah statutory law and thus inapplicable to the actions of law enforcement on the Uintah-Ouray Reservation. But the doctrine of hot pursuit is also a federal common law doctrine that has application here.

a firearm may have created an exigent circumstance that rendered the extra-jurisdictional seizure reasonable. *See Ross. v. Neff,* 905 F.2d at 1354 ("Absent exigent circumstances [a warrantless arrest of a tribe member on tribal lands] is presumptively unreasonable.").

Reasonableness

Use of deadly force is analyzed under the Fourth Amendment. *Blossom v. Yarbrough,* 429 F.3d 963, 967 (10th Cir. 2005). "A police officer may reasonably use deadly force to apprehend a fleeing suspect if the officer has probable cause to believe that the suspect poses a serious threat of physical harm either to the officer or others and if, where feasible, the police warn the suspect." *Id.* "To state a claim under the Fourth Amendment, plaintiffs must show both that a 'seizure' occurred and that the seizure was 'unreasonable.'" *Childress v. City of Arapaho,* 210 F.3d 1154, 1156 (10th Cir. 2000). The court looks at the totality of the circumstances to determine whether a particular seizure is reasonable. *Tennessee v. Garner,* 471 U.S. 1, 8-9, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985); *Medina v. Cram,* 252 F.3d 1124, 1132 (10th Cir. 2001) (noting that the court may consider an officer's reckless behavior that created the need to use force when considering the reasonableness of a seizure under the totality of the circumstances). The fact that a seizure violates state or federal statutory law is one factor in determining whether a search is reasonable under the United States Constitution. *See United States v. Green,* 178 F.3d 1099, 1105-06 (10th Cir. 1999) (holding that exercising law-enforcement authority outside of state-defined jurisdictional boundaries is not

a federal constitutional violation where officers obtained a lawful warrant). Although the Tenth Circuit has held that a seizure of a tribe member on tribal land is presumptively unreasonable, the court must still evaluate whether exigent circumstances existed to justify the extraterritorial seizure. *See United States v. Atwell,* 470 F. Supp. 2d 554, 570-71 (D. Md. 2007).

The District of Maryland recently concluded that a warrantless search and arrest outside of an officer's jurisdiction did not render the officer's actions unconstitutional. In *Atwell,* a military patrol officer at Fort Meade observed the defendant speeding and driving erratically. *Id.* at 559. The officer pursued the defendant off the military base. *Id.* at 560. After local law enforcement declined to execute the stop, the officer administered a field sobriety test, which the defendant failed. *Id.* at 560. The officer then arrested the defendant. *Id.* The defendant moved to suppress the search because the officer exercised law enforcement authority outside his jurisdiction without the authorization of federal or state statutory authority. *Id.* at 561. The court concluded that the stop was not justified under either statute or common law, but ultimately upheld the stop under the Fourth Amendment. In upholding the search, the court determined that the officer had probable cause for the stop, that the offense began in the arresting officer's jurisdiction, that the officer did not intend to act outside his territorial jurisdiction, and that the exigent circumstance of allowing a potentially drunk driver back out on the road justified the stop. *Id.* at 577.

Detective Norton had less justification for pursuing Mr. Murray than the officer in *Atwell.* He had no probable cause to believe that Mr. Murray had violated the law because Mr. Murray was not the driver of the speeding car. Neither he nor the other officers involved in the pursuit contacted the local tribal authority to inform them of the chase. Mr. Murray's offense, if he committed one, did not begin in the pursuing officers' jurisdiction, but rather when he fled the officers pursuing him on foot on the Uintah-Ouray Reservation. In fact, the officers' disregard of the jurisdictional boundaries may have contributed to the need to seize Mr. Murray. Further, the policy of encouraging the self-governance of Indian tribes weighs heavily against finding an extraterritorial seizure to be reasonable. Nonetheless, if Mr. Murray displayed, brandished, or shot his firearm toward Detective Norton prior to Detective Norton's use of force against Mr. Murray, exigent circumstances justify Detective Norton's seizure of Mr. Murray.[4] *See United States v. Chavez,* 812 F.2d 1295, 1299 (10th Cir. 1987) (holding that reasonable belief that an individual poses a threat to officer safety constitutes an exigent circumstance justifying a warrantless search).

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4. Plaintiffs argue that Mr. Murray had the right to shoot at Detective Norton because he had the "right to use such force as a reasonably prudent person might do in resisting [an illegal] arrest." *Bad Elk v. United States,* 177 U.S. 529, 533, 20 S. Ct. 729, 44 L. Ed. 874 (1900). But shooting a gun at an officer is, as a matter of law, not a reasonably prudent amount of force to resist an illegal arrest. *See Graves v. Thomas,* 450 F.3d 1215, 1224 (10th Cir. 2006) (holding that an erratic high-speed chase was not reasonable resistence to an unlawful arrest).

Because there are conflicting inferences to be drawn about who began shooting first, there are disputed facts about whether Detective Norton's extraterritorial seizure of Mr. Murray was justified by exigent circumstances.

Qualified Immunity

Defendants argue that they are entitled to qualified immunity because it was not clearly established at the time of the shooting that Mr. Murray was not subject to seizure by Utah law enforcement while on the Uintah-Ouray Reservation. Defendants are entitled to qualified immunity only if (1) "the defendant's actions violated a Constitutional or statutory right;" and (2) "the right was clearly established at the time of the defendant's unlawful conduct." *Serna v. Colorado Dept. of Corrections*, 455 F.3d 1146, 1150 (10th Cir. 2006). A right is clearly established if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Thomas v. Durastanti,* No. 07-3343, 2010 U.S. App. LEXIS 11458 at * 32, 607 F.3d 655 (June 4, 2010) (internal quotations omitted). The law is clearly established if a Supreme Court or Tenth Circuit decision makes "apparent to a reasonable officer . . . that his conduct was unlawful." *Id.*

Defendants argue that if they were not allowed to pursue Mr. Murray on the Uintah-Ouray Reservation, the law did not clearly establish that they could not do so. They argue that *Ross* expressly allows state law enforcement officers to seize tribe members when exigent circumstances are present. But in this case no exigent circumstance justified the pursuit of Mr. Murray,

and exigent circumstances existed only if Mr. Murray displayed, brandished, or shot his weapon at Detective Norton before Detective Norton opened fire. Defendants also argue that *Hicks* casts doubt on the holding in *Ross.* But, as discussed above, *Hicks* prohibits tribes from regulating outside their jurisdictional authority, but does not alter the state's jurisdiction. *Hicks* does not permit state law enforcement officers to pursue tribe members on tribal land for crimes committed on tribal land.

Mr. Murray's constitutional right to be free from unreasonable seizure, both based on a lack of probable cause and a lack of jurisdiction, was clearly established at the time he was allegedly seized. If Officer Norton pulled his gun on Mr. Murray prior to Mr. Murray displaying, brandishing, or shooting his firearm, Officer Norton does not have qualified immunity for his actions.

Utah Governmental Immunity Act

Defendants argue that the Utah Governmental Immunity Act bars Plaintiffs' state law claims because Mr. Murray's death arose from an assault or battery. The UGIA explicitly retains immunity for claims "if the injury arises out of, in connection with, or results from: . . . assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights." Utah Code Ann. § 63G-7-301(5)(b).

Plaintiffs respond that Detective Norton's actions were an intentional doing of a wrongful act for which immunity was waived under Utah Code section 63G-7-202(3)(c)(i). But there is no allegation that Detective Norton knew he was effecting an extraterritorial seizure when he shot back at Mr. Murray. Even if Detective Norton was grossly negligent in his actions, "[g]ross negligence, by definition, is not willful or intentional." *Daniels v. Gamma West Brachytherapy,* LLC, 2009 UT 66, P 41, 221 P.3d 256. Accordingly, if the UGIA applies, the Plaintiffs' state law claims for assault and battery and wrongful death are barred.

Plaintiffs next argue that the UGIA doesn't apply to the events here because they took place outside the jurisdictional boundaries of Utah. Even in states, like Utah, where the Indian lands remain under federal jurisdiction, state law still applies under some circumstances. *Organized Village of Kake et al. v. Egan,* 369 U.S. 60, 67, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962). "[T]he test of whether a state law [can] be applied on Indian reservations [is] whether the application of that law would interfere with reservation self-government." *Id.* (noting that the Utah constitution contains identical provisions to those construed in the case). Conversely, on tribal lands "[s]tate jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Shivwits Band of Paiute Indians v. Utah,* 428 F.3d 966, 981 (10th Cir. 2005).

Plaintiffs maintain that the UGIA does not apply because Detective Norton's actions took place outside of the jurisdiction of the state of Utah, and that application of the UGIA interferes with self-governance. In support of this argument, Plaintiffs urge the court to analogize this case to *Nevada v. Hall,* 440 U.S. 410, 422-27, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979). In *Hall,* the United States Supreme Court refused to extend California's governmental immunity law to events in Nevada. But the relationship between a state and the tribal lands located within a state's borders is distinguishable from the relationship between neighboring states. Specifically, the state retains jurisdiction over non-tribe members who commit victimless crimes or crimes against other non-tribe members on tribal land. *See Hicks,* 533 U.S. at 361 ("State sovereignty does not end at a Reservation's borders."); *MacArthur v. San Juan County,* 497 F.3d 1057, 1070 (10th Cir. 2007) (holding that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."). As the court has previously noted, "the immunity from court action by individuals is a critical constituent of sovereignty, both for the Tribes and the States." *MacArthur v. San Juan County,* 391 F.Supp. 2d 895, 1036 (D. Utah 2005) (applying the UGIA to actions of non-tribe members that took place on tribal land). The application of the UGIA does not infringe on the ability of tribes to govern themselves, but rather promotes the sovereignty of both the state and the tribe.

Because the UGIA applies to Defendants' actions on the Uintah-Ouray Reservation, the court dismisses Plaintiffs' assault and battery and wrongful death claims.

Appendix F

CONCLUSION

Because the State of Utah and the Vernal City Police Department are no longer named as defendants in this action, their motions to dismiss are DENIED as moot. (Dkt. Nos. 3, 25.) The court GRANTS in part and DENIES in part the motions to dismiss filed by Vance Norton and Vernal City. (Dkt. Nos. 26, 28.)

DATED this 26th day of July, 2010.

BY THE COURT:

/s/ Tena Campbell
TENA CAMPBELL
Chief Judge

APPENDIX G — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED FEBRUARY 24, 2016

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 14-4040 and 14-4144

DEBRA JONES AND ARDEN C. POST, INDIVIDUALLY AND AS THE NATURAL PARENTS OF TODD R. MURRAY, *et al.*,

Plaintiffs-Appellants,

v.

VANCE NORTON, VERNAL CITY POLICE OFFICER IN HIS OFFICIAL AND INDIVIDUAL CAPACITY, *et al.*,

Defendants-Appellees.

ORDER

Before **BRISCOE**, **McKAY** and **BACHARACH**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing *en banc* was transmitted to all of the judges of the court who are in regular active

service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/_____
ELISABETH A. SHUMAKER
Clerk